89-900

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

In Re PARR MEADOWS RACING ASSOCIATION, INC.,

Petitioner in Bankruptcy,

SUFFOLK COUNTY TREASURER,

Petitioner,

v.

JAMES BARR, as Trustee of PARR MEADOWS RACING ASSOCIATION, INC. and HARVEY L. GOLDSTEIN, as Trustee of RONALD J. PARR, RONALD J. PARR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 1, 1989

QUESTION PRESENTED

I

Whether a municipality is entitled to perfect post-petition priority liens for unpaid real property taxes pursuant to Bankruptcy Code Sections 362(b)(3), 545 and 546(b).

LIST OF PARTIES

The parties to the proceedings below were:

Petitioner: Suffolk County Treasurer

Respondents: James Barr, as trustee of Parr Meadows Racing Association, Inc.; Harvey L. Goldstein, as trustee of Ronald J. Parr; Ronald J. Parr; Lincoln Savings Bank, as successor in interest for Flushing Savings Bank; American Home Insurance Company; National Union Fire Insurance Company of Pittsburgh, Pa.; New Hampshire Insurance Company; T. Frederick Jackson, Inc.; Motor City Electric Co.; Michael Harris Spector; Jack C. Hirsch, Inc.

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Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Suffolk County Treasurer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on October 3, 1989.

Petitioner seeks this writ of certiorari on the grounds that there is a clear and intolerable conflict among the Circuit Courts in the interpretation and application of federal bankruptcy statutes; the case presents an important issue of bankruptcy administration which requires resolution by the Court; and the determination of this issue will significantly affect the ability of local governments to provide municipal services.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 880 F.2d 1540, and is reprinted in the appendix hereto, pp. 1a-41a, *infra*.

The memorandum decision and order of the United States District Court for the Eastern District of New York (Wexler, J.) is reported at 92 B.R. 30, and is reprinted in the appendix hereto, pp. 42a-77a, *infra*.

The decision and order of the United States Bankruptcy Court for the Eastern District of New York (Hall, J.) have not been reported. They are reprinted in the appendix hereto, pp. 78a-89a, infra.

JURISDICTION

Invoking federal jurisdiction under 11 U.S.C. Bankruptcy Rule 7001, the trustees in bankruptcy commenced an adversary proceeding to determine the seniority of liens against the proceeds of the sale of the property of the debtor. On July 7, 1987, Judge Hall of the Bankruptcy Court for the Eastern District of New York denied the application of Suffolk County to have its post-petition tax liens satisfied prior to the claims of the secured creditors. On October 14, 1988, the District Court affirmed the order of the Bankruptcy Court.

On July 24, 1989, the Second Circuit reversed the District Court in part, affirmed

in part and remanded the case for a calculation of the County's tax liens through 1979-1980 and the interest thereon.

On September 20, 1989, the County's petition for a rehearing and suggestion for a rehearing en banc was denied. On November 1, 1989, the County's application to recall the mandate of the Second Circuit and to stay the issuance of the mandate pending this application for a writ of certiorari was granted.

The jurisdiction of the Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

11 U.S.C. § 362. *Automatic stay*

11 U.S.C. § 506(b). *Determination of secured status*

11 U.S.C. § 545. *Statutory liens*

11 U.S.C. § 546. *Limitations on avoiding powers*

The foregoing statutes are all reprinted verbatim in the appendix hereto, pp. 90a-109a, *infra*.

STATEMENT OF THE CASE

A. The Bankruptcy Proceeding

On October 4, 1979, Parr Meadows Racing Association, Inc. ("Parr Meadows") filed for reorganization pursuant to Chapter 11 of the Bankruptcy Code. By order of the Bankruptcy Court dated April 7, 1980, that proceeding was converted to a liquidation case.(A 38)[1]

B. The Sale Of The Bankrupt's Property

The sole significant asset of Parr Meadows was a racetrack located on approximately 190 acres of land in Suffolk County, New York. On May 10, 1985, over the objection of Suffolk County, the trustees in bankruptcy sold the racetrack, pursuant to

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[1]References preceded by the letter "A" are to petitioner's appendix to the Second Circuit.

court order, for a total purchase price of $11,490,000.00. Of this amount, $750,000.00 was paid in cash and the remaining $10,750,000.00 was subject to a note and mortgage on the property.(A 23) The property was sold free and clear of all liens with the provision that said liens attached to the proceeds of the sale. (Id.)

C. Suffolk County's Super Priority Claim

Suffolk County's interest in the racetrack property arose from the failure of the bankrupt or its estate to pay the real property taxes due to the County for the tax years 1978-1979 through 1984-1985. At the time that the racetrack was sold in 1985, the total of unpaid taxes was $2,245,978.70, calculated as follows:

Tax Year	Flat Tax
1978-79	$327,231.45
1979-80	333,859.50
1980-81	369,778.50
1981-82	382,753.80

1982-83	400,262.85
1983-85	432,092.70

Together with interest and penalties thereon, Suffolk County's claim is in excess of $4.3 million dollars.(A 26, 37). However, since one creditor holds a first mortgage lien in the amount of $14 million, the County's tax claims for 1981 through 1985 will be extinguished unless it is granted super-priority status.

D. Court Proceedings to Determine Priority of Liens

On October 3, 1985, the trustees commenced an adversary proceeding in the Bankruptcy Court for a determination of the priority of liens attaching to the proceeds of the sale. (A 33) The Treasurer of Suffolk County sought to have the County's claim for taxes satisfied ahead of the claims of all secured creditors.

The County Treasurer's application was predicated upon the automatic stay and lien

avoidance provisions of the Bankruptcy Code (11 U.S.C. §§ 362, 545 and 546(b)) and the decision of the Court of Appeals for the Fourth Circuit which permitted the perfection of post-petition real property tax liens and accorded them a superpriority status, *Maryland National Bank v. Mayor and City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983).

The Bankruptcy Court, upon stipulated facts, held that "Suffolk County has a superior claim only for taxes assessed pre-petition," (i.e.: 1978-1979) and that its "interest in post-petition taxes is unsecured and subordinate to Lincoln Savings Bank." pp.80a, 82a, *infra*. Although aware of the Fourth Circuit's holding in *Maryland National Bank v. Mayor & City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983), the Bankruptcy Court expressly disagreed with that decision and without any discussion refused to apply that precedent to the facts of this case. p.82a, *infra*.

The District Court affirmed. pp. 42a-77a, *infra*. It, too, rejected the Fourth Circuit's reasoning and holding in *Maryland National Bank. Id.* The District Court held that the automatic stay provisions of Title 11, U.S.C., § 362 (a)(4) bar the creation or perfection of postpetition liens for unpaid real property taxes. p.70a, *infra*. It refused to hold that 11 U.S.C. §§ 362(b)(3) and 546(b) constitute an exception to the automatic stay. Instead, it found that the County has no interest in real property taxes until such time as the taxes accrue and become due and payable. p.57a, *infra*.

The Second Circuit affirmed in part and reversed in part. pp.1a-41a, *infra*. The Court of Appeals found that the County's interest in the property became "sufficient to fall under § 546(b) on June 1, the tax status date" rather than on December 1, the date when the taxes became due and payable. The Circuit Court held that the County was

entitled to a priority claim for the 1978-1979 and the 1979-1980 tax years.

The Circuit Court, however, affirmed the lower courts in refusing to follow the Fourth Circuit's determination in *Maryland National Bank* that a local government has a long-standing and ever present interest in collecting real property taxes, and refused to find that Bankruptcy Code sections 362(b)(3) and 546(b) constituted an exception to the automatic stay.

REASONS FOR GRANTING THE WRIT

I. A. An Intolerable Conflict Exists Between The Second Circuit And Two Other Circuit Courts In The Interpretation And Application Of Bankruptcy Code Sections 362(b)(3) and 546(b) To The Perfection And Priority Of Post-Petition Real Property Tax Liens.

The four federal courts of appeals which have ruled on the question of whether Bankruptcy Code Sections 362(b)(3) and 546(b) permit post-petition tax liens to be perfected and be paid ahead of secured

creditors from the proceeds of the debtor's estate are equally, and sharply, divided. The Fourth and Fifth Circuits have recognized this exception to the automatic stay and have accorded such post-petition tax liens paramount superiority. *Maryland National Bank v. The Mayor and City Council of Baltimore, supra*, 723 F.2d 1138 (4th Cir. 1983); and *Stanford v. Butler*, 826 F.2d 353 (5th Cir. 1987) The Second Circuit here, and the Third Circuit in *Equibank, N.A. v. Whelling-Pittsburgh Steel Corporation*, 884 F.2d 80 (3d Cir. 1989), have rejected this interpretation and application of the Bankruptcy Code.

Maryland National Bank v. The Mayor and City Council of Baltimore, supra, is the seminal case on this issue. There, the city's claim for taxes had accrued after the debtor's petition in bankruptcy had been filed. The Fourth Circuit found that the city's ongoing tax interest was one which arose prior to

the creation and perfection of a given tax year's lien. *Id.* at 1142. On that basis, the city's claim for taxes was deemed to relate back in time, and thus was preserved under 11 U.S.C. § 546(b). Otherwise, the Fourth Circuit reasoned, the filing of a bankruptcy petition would work an unfair advantage:

> Congress in enacting § 546(b) perceived that the mere intervention of a petition in bankruptcy should not be permitted to defeat what would otherwise be a valid security interest in property. If that interest awaits perfection, and if the generally applicable state law permits that perfection to be good against an intervening purchaser, then the trustee should stand in no better shoes than such an intervening purchaser.

Id. at 1144.

In *Stanford v. Butler, supra,* the Fifth Circuit relied upon the holding in Maryland National Bank as it determined that post-petition tax liens against the debtors'

real property were secured interests as well as priority claims under the Bankruptcy Code. The Fifth Circuit followed the approach of the Fourth Circuit:

> In the Bankruptcy Code, Congress specifically provided the conditions under which statutory liens on a debtor's property could be avoided by the trustee in bankruptcy; Congress could have allowed a trustee to avoid all unrecorded liens or all unrecorded state tax liens, but did not do so. Instead, Congress provided that a lien could be avoided if, *inter alia*, it "is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser...whether or not such a purchaser exists."

826 F.2d at 355.

Here, the Second Circuit determined that the County's interest in the debtor's real property arises only on the date that property is assessed each year. In so doing, the Court expressly stated that it was "unpersuaded by the Fourth Circuit's view that the county has an interest in the

property that is 'ever-present' because of its inherent governmental authority and control over the land." 880 F.2d at 1547; p. 29a *infra.* This decision directly conflicts with the Fourth and Fifth Circuits, a conflict which was duly noted by the Third Circuit in the subsequent case of *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp., supra,* 884 F.2d at 85-86.

Morever, an examination of the reasons advanced by the Second Circuit to minimize the significance of this conflict and to harmonize its decision with the Fourth Circuit's decision in Maryland National Bank establishes that a clear and substantial conflict still exists. First, the Second Circuit attempted to distinguish the Fourth Circuit's decision on the grounds that both cases depended heavily upon different state laws. However, a review of the Fourth Circuit's decision establishes that this was not the case. Without referring to Maryland

law in particular, the Fourth Circuit noted that "One regularly buys real estate knowing that purchase entails an obligation to meet future real estate taxes when they become due and payable". *Id.* at 1143. Although the Second Circuit did not discuss the Maryland statute, a comparative analysis of the New York and Maryland statutes would reveal that they are not substantially different; in each state, the real estate taxes become due and payable on a given date and become a lien as of that date. ***Suffolk County Tax Act*** §14; ***Md. Ann. Code*** art. 81 §§48(e) and 70.

Under both New York and Maryland law, an intervening hypothetical purchaser on the date that the bankruptcy petition is filed would be subject to pay future accruing real estate taxes. *Id.* The Fourth Circuit further held that the trustee should not stand in better shoes than such an intervening purchaser. However, under the Second

Circuit decision in this case, a trustee does stand in better shoes than an intervening purchaser since the trustee can avoid paying taxes which a bona fide purchaser could not avoid.

The second basis upon which the Second Circuit believed that its decision did not create a conflict with *Maryland National Bank* was that in both cases the municipality's interest, recognized at the final assessment date, arose prior to the filing of the petition in bankruptcy. This analogy is simply wrong. In *Maryland National Bank*, the assessment date came after the filing of the petition; here the assessment date occurred two weeks before the filing date. In fact, the Second Circuit disallowed post-petition real property tax lien interests which the Fourth Circuit would have recognized, and for that reason the decisions directly conflict.

This conflict over the proper interpretation and application of the trustee's avoidance powers under 11 U.S.C. 362(b)(3) and 546(b) also exists in lower federal courts. In *In Re Microfab, Inc.*, 1989 Bankr. LEXIS 1575, the Bankruptcy Court for the District of Massachusetts held that the automatic stay did not bar the State's right to record an environmental superlien. In its opinion, the court noted eleven cases where various federal district courts have applied sections 546(b) and 362(b)(3) to uphold a variety of liens that were perfected after the commencement of the bankruptcy case. *Id.* p. 7, n4. That court refused to follow a line of five other district court cases which precluded post-petition liens. *Id.* at p. 18.

Most recently, the reasoning of the Second Circuit in this case was adopted by the Bankruptcy Court of the District of New

Jersey. *See, Isley v. Horn & Company, P.C.*, 1989 Bankr. LEXIS 1451.

This conflict between the Circuit Courts and District Courts is intolerable, and has resulted in disparity in the application and construction of federal statutes. In addition, since this issue has been addressed repeatedly by various lower courts during the past decade, it is ripe now for consideration and resolution by the Court.

B. The Adverse Impact Upon a Local Government's Fiscal Ability to Provide Municipal Services and the Resulting Confusion in the Administration of a Bankrupt's Estate Warrant Intervention by the Court.

The issues presented by this case provide an opportunity for the Court to preserve the municipality's obligation to provide its citizens with vital services and to render guidance for the orderly and

uniform administration of an estate under the Bankruptcy Code.

The lower court decision creates a significant problem for municipalities during protracted bankruptcy proceedings. The District Court noted its concern about the depletion of already strained government coffers, and the resultant cut back in municipal services from a lack of revenue:

> The Court, nonetheless, is somewhat troubled by the resulting loss of tax revenue that the County will suffer. tax revenues that it would otherwise derive from the race track property if it were occupied by one not operating under the protection of the bankruptcy code. The very existence of government is contingent upon the successful collection of taxes. The County's receipt of taxes enables it to achieve its objectives and perform the functions of government. Those paying taxes do so in order to enjoy the protection of their property interests....

92 B.R. 30, p. 62a, *infra*.

This problem was also recognized by the Second Circuit when it noted that "the

prohibitions of § 362(a), when applied to the taxing arm of local government, may hinder that government...from collecting funds needed for its continuing operations, and, at least in part, from receiving full compensation for services that may benefit the debtor or the debtor's property." 880 F.2d at 1545; p.21a *infra*. Local taxation is recognized as the established means of providing for a variety of local services, including police, fire protection, public health and hospitals, and public utility facilities. *See, San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 54-55, 93 S.Ct. 1278, 1308, 36 L.Ed.2d 16, 55 (1973).

There is no question that the priority of creditors and the disbursement of the proceeds of the estate are the heart and core of bankruptcy administration. The Court has recently granted certiorari where

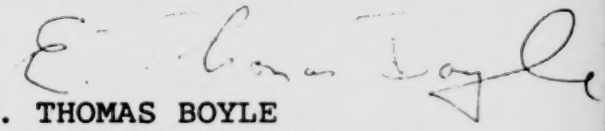
significant issues in bankruptcy administration are presented. *See, United States v. Ron Pair Enterprises, Inc.*, ___U.S.___, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)(whether creditor may receive post-petition interest on pre-petition tax liens): *California State Board of Equalization v. Sierra Summit, Inc.*, ___U.S.___, 109 S.Ct. 2228, 104 L.Ed.2d 910 (1989)(whether sales and use taxes may be assessed against proceeds of a liquidation sale). The case here is of even greater significance because of the numerous conflicts that have arisen among the various circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: Hauppauge, New York
December 1, 1989

Respectfully submitted,



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December 1, 1989

APPENDIX

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 894 August Term 1988

Argued: March 9, 1989 Decided: July 24, 1989

Docket No. 88-5045

----------X

In Re PARR MEADOWS RACING ASSOCIATION, INC.

Debtor.

****

In Re RONALD J. PARR,

Bankrupt.

LINCOLN SAVINGS BANK, FSB, AMERICAN HOME INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE CO. of PITTSBURGH, PA., NEW HAMPSHIRE INSURANCE COMPANY and T. FREDERICK JACKSON, INC.,

Plaintiffs-Appellees,

V.

SUFFOLK COUNTY TREASURER,

Defendant-Appellant.

----------X

BEFORE: VAN GRAAFEILAND, CARDAMONE, and PRATT, Circuit Judges.

Appeal from judgment of the United States

District Court for the Eastern District of New York, Leonard D. Wexler, Judge, affirming an order of the United States Bankruptcy Court for the Eastern District of New York, Robert J. Hall, Judge, holding that the automatic stay, 11 U.S.C. § 362(a)(4), barred creation of priority liens for unpaid real property taxes after filing of bankruptcy petitions, and refusing to award penalties and interest on underlying tax claims.

Affirmed in part, reversed in part, and remanded.

DENNIS E. MILTON, Chief Deputy County Attorney for the County of Suffolk (E. Thomas Boyle, Suffolk County Attorney, Brian B. Mulholland, Assistant County Attorney, of Counsel) for Appellant County Suffolk.

HAROLD P. WEINBERGER, New York, NY (Linda C. Goldstein, Kramer, Levin Nessen, Kamin & Frankel, of Counsel), for Appelle Lincoln Savings Bank.

PRATT, Circuit Judge:

On this bankruptcy appeal we must balance two important competing interests: a creditor's interest in recovering as much of its claim as possible from a bankruptcy debtor, and a local government's interest in obtaining payment of its property taxes. The County of Suffolk, New York ("the county") appeals from a judgment of the United States District Court for the Eastern District of New York, Leonard D. Wexler, Judge, affirming an order of the United States Bankruptcy Court for the Eastern District of New York, Robert J. Hall, Judge, holding that the automatic stay, 11 U.S.C § 362(a)(4), bars the creation of postpetition liens for unpaid real property taxes, and denying postpetition penalties and interest on the underlying tax claims. We hold (1) that the automatic stay prohibits the creation of a local tax lien upon real property unless the county has a prepetition interest in the real property; (2) that the

county obtains an interest in the real property as of the "tax status date"; (3) that the county is entitled to a priority for postpetition interest on valid tax liens; and (4) that the county is not entitled to a priority for penalty fees on any tax claims. Accordingly, we affirm in part, reverse in part, and remand.

BACKGROUND

A. Real Property Taxes in Suffolk County.

Preliminarily, we should note that under the systems for taxing real property in Suffolk County, assessed values are made an reviewed by assessors in each of the ten towns, and taxes are levied by multiple tax districts. But all procedures for the collection of delinquent taxes are carried out by the county itself. It is for this reason

that these proceedings are brought by the county, rather than by the towns or school districts. For convenience we have sometimes used the term "county" to include these other districts.

Taxation of real property in the county is governed by New York law, see N.Y. Real Prop. Tax Law § 1 et seq., and by the Suffolk County Tax Act (the "tax act"). Specific provisions require that town assessors assess all real property located in their respective towns according to its condition and ownership "as of" the tax status date for each year -- June 1 in Suffolk County; N.Y. Real Prop. Tax Law § 302; Suffolk County Tax Act § 5; that they prepare thereafter an official assessment roll, listing all taxable property in the county, Suffolk County Tax Act 6; that, on the third Tuesday of July, the assessors hold a hearing after public notice to consider

complaints and proposed modifications to the assessment roll, id.; and that twenty days prior to the hearing, the assessors provide notice to all property owners whose assessment has increase. Id. By September 1, the roll must be "completed, verified and filed", id. § 6, so that taxes may be computed and levied by the various tax districts based on the final assessment values.

Taxes computed from the assessment roll become "due and payable on December first of each year", when they "become a lien on the real property. Id. § 13(b). The taxpayer may then make payment without penalty until January 10; thereafter, a one-time penalty of five-percent is added to the tax amount, and interest begins to run on both the tax and the penalty at the rate of one-percent per month, id. §§ 13 to 13-c, until either the full

amount is paid or the land is sold by tax sale. See id. §§ 40-75.

Thus, in any given tax year, the formal process for taxation of real property in the county begins on June 1, the tax status date, continues through December 1, when the taxes become due and a lien on the property is perfected, and ends only with the payment of taxes by the property owner.

B. Facts.

The dispute in this case centers in the bankruptcies of the related debtors: Parr Meadows Racing Association ("the association"), and Ronald J. Parr ("Parr"), who, during all times relevant to this appeal, served as chairman of the board of the association. Parr filed for bankruptcy on June 12, 1979; four months later, on October

4, 1979, the association petitioned for reorganization under chapter 11. This reorganization was subsequently converted to a liquidation case under chapter 7.

The principal asset of Parr and the association, and the only asset at issue on this appeal, is the Parr Meadows Racetrack ("the racetrack"), a property located in eastern Suffolk County and valued at several million dollars. Rightful ownership of the racetrack is still the subject of some dispute, but that issue is not before us on appeal. For our purposes, it is sufficient to note (1) that taxes were not paid on the racetrack property for six of the seven tax years between 1978-79 and 1984-85, and (2) that several secured creditors, including Lincoln Savings Bank, American Home Insurance Company, National Union Fire Insurance Company, New Hampshire Insurance Company, and

T. Frederick Jackson, Inc. (collectively "the secured creditors") hold valid mortgages on the property, all perfected before Parr and the association filed for relief under the bankruptcy provisions.

Leaving to another day their differences as to who owned the racetrack, trustees for both Parr and the association agreed that the property should be sold. They therefore made application to, and received permission from, the bankruptcy court to sell the property to Suffolk Meadows Corporation, free and clear of all previous mortgages and liens, for a purchase price of $750,000 in cash, plus a note and mortgage on the property for $10,750,000. Thereafter, also with the bankruptcy court's approval, the note and mortgage we discounted and sold by the trustees for a cash sum of $7,500,000; all earlier mortgages and liens that previously

encumbered the racetrack property, were transferred to the proceeds of this sale. Claims of the secured creditors exceeded the total proceeds of the sale.

Dispute then arose between the county and the secured creditors as to how the cash sum should be distributed. The county claimed a priority, maintaining that all back property taxes should be paid first, and it submitted the following amounts as overdue:

Tax Year	Flat Tax
1978-79	$327,321.45
1979-80	333,859.50
1980-81	369,778.50
1981-82	382,753.80
1982-83	400,262.85
1984-85	432,092.70

The county's claim relies on the annual tax liens which, absent bankruptcy, attached to the racetrack every December 1. In addition, the county asserted that it should receive

priority for both penalties and interest on the unpaid amounts as provided by the tax act.

The secured creditors opposed any payment to the county, other than the first lien for the year 1978-79, which was created and perfected before June 12, 1979, when the bankruptcy proceeding commenced. As to all the other tax years, the secured creditors contended that the automatic stay prohibited the creation or perfection of any tax lien after the bankruptcy petitions were filed so that the county stood in the shoes of an unsecured creditor, and could collect its back property taxes only after the claims of the secured creditors were fully satisfied. For both interest and penalties, the secured creditors argued, the county had no priority at all.

As an interim measure, Judge Hall ordered that $500,000 of the proceeds be deposited with the county until he could resolve this issue. Then, after argument, he held that the county possessed a priority tax lien only for the 1978-79 tax year, and that all subsequent tax liens were invalid. This was so, the bankruptcy court reasoned, because, while the 1978-79 tax lien was created and perfected before the bankruptcy proceedings were commenced, the remaining tax liens could not have been created and perfected until after the protection of § 362(a) came into effect, thus rendering those claims of the county "unsecured and subordinate to the claims of the [secured creditors]."

Having found all but one of the tax liens to be void, the bankruptcy court then found it unnecessary to determine whether penalties and interest were due on the liens. Instead,

it simply ordered that the county return $172,768.55 to the trustees, the difference between the 1978-79 taxes due (without penalties or interest) and the $500,000 deposited with the county.

The county appealed to the United States District Court for the Eastern District of New York, and on October 14, 1988, Judge Wexler affirmed the bankruptcy court in all respects. First, utilizing the same reasoning as the bankruptcy court, the district court held that the 1978-79 tax lien was valid and enforceable, but that the tax amounts secured by liens created and perfected after the bankruptcy petitions were filed were unsecured and would be payable only after the claims of the secured creditors were satisfied.

Second, as to postpetition interest, the district court concluded that, even on the

valid lien for the 1978-79 tax year, 11 U.S.C. § 506(b) did not authorize recovery of post-petition interest. A fortiori the county was not entitled to any postpetition interest for any subsequent tax year.

Finally, the district court held that "[d]ebts owed to the government as a penalty * * * cannot be recovered against a bankrupt estate unless the amount owed reflects an actual pecuniary loss". Finding no such loss, the court rejected all the county's claims for penalties on the overdue amounts, including the one based on the valid lien for the 1978-79 tax year.

The county appeals.

DISCUSSION

The county contends that the district and bankruptcy courts erred when they refused to award it a priority over the secured creditors as to (1) the postpetition liens securing the unpaid property taxes on the racetrack; (2) interest of one percent per month from the time the taxes were due; and (3) a five-percent penalty on the overdue amount for each tax year.

A. The Liens Securing the Postpetition Real Property Taxes.

Both courts below held that the tax liens perfected after June 12, 1979 -- the date when the first bankruptcy petition was filed -- were invalid because they violated the automatic stay, 11 U.S.C. § 362(a). That provision states in relevant part:

> a petition filed under * * * this title * * * operates as a stay, applicable to all entities, of * * * (4) any act to create, perfect,

or enforce any lien against the property of the estate.

The county launches a two-pronged attack against this determination, contending that, by its explicit terms, § 362(a)(4) does not apply in this case, and in the alternative, if the section does apply, that congress carved out an exception for local tax liens when it passed §§ 362(b)(3) and 546(b) of the bankruptcy code.

1. The application of § 362(a)(4).

The county relies on a narrow reading of the statute. Since the automatic stay prohibits only any "act" to create, perfect,]enforce a lien, the county argues that it falls outside the scope of this prohibition because, under the tax act, a tax lien is created and perfected "by operation of law" without any "affirmative act" by the county. In effect, the county maintains that it has not violate the automatic stay because each tax

lien, without any "affirmative act" by the county, has created and perfected itself "by operation of law". We reject this argument.

At the outset, we are unpersuaded that the tax liens at issue here came into being without any "affirmative act". On the contrary, an examination of the tax act reveals several "acts" which must take place before the lien attaches. For example, the assessors must prepare a preliminary assessment roll, give notice and hear complaints, complete the final assessment roll, and certify the roll to the school districts, Suffolk County Tax Act §§ 5-7; the taxing authority must compute and adopt the tax rate, id. § 8; the town supervisors must "extend or cause to be extended upon the assessment roll" the taxes against each taxable property and file a certificate with the county legislature, id. §§ 11-12; and the county legislature must annex a

warrant to the assessment roll of each town. Id. § 13(a). Thus, the tax liens here did not come passively into being "by operation of law"; rather, they were created and perfected as a direct result of the county's assessment and taxation process, which consists of several "affirmative acts" by county, town, and school district officers, administrators, and agents. See In re Guterl, 95 Bankr. 370, 373-75 (W.D. Pa. 1989) (in the taxation process, "act of publication, confirmation, and adoption are acts of creation"; if these acts occurred "postpetition in violation of § 362(a)(4)", then the liens resulting from the tax process are "null and void").

Further, even if it were possible to create and perfect a lien without any action by the county, that lien, attaching to the property postpetition, would still violate the automatic stay. In re Bellman Farms, Inc., 86

Bankr. 1016, 1020 (D.S.D. 1988) (creation and perfection of postpetition liens, which became due and owing by operation of law and without affirmative act by county, nevertheless violated automatic stay); In re Ballentine Bros., Inc., 86 Bank 198, 200-01 (D. Neb. 1988) (even though statute provided for creation and perfection of tax lien without any action by county, postpetition lien violated provisions of automatic stay); In re Stack Steel & Supply Co., 28 Bankr. 151, 155 (W.D. Wash. 1983) ("any lien which is claimed by [the county] to have attached after the filing of the Chapter 11 petition is void") (emphasis in original); see also H. & H. Beverage Distributors v. Department of Revenue, 850 F.2d 165, 170 n.6 (3d Cir.) (once automatic stay is in place, "the creation of any lien, regardless of * * * its purpose is barred by § 362"), cert. denied, 109 S. Ct. 560 (1988); In re Carlisle Court, Inc., 36 Bankr 209, 214 (D.D.C. 1983) ("in its

broad application" the automatic stay prevents any "creation of a lien").

The automatic stay is a crucial provision of bankruptcy law. It prevents disparate actions against debtors and protects creditors in a manner consistent with the bankruptcy goal of equal treatment, see Hunt v. Bankers Trust Co., 799 F.2d 1060, 1069 (5th Cir. 1986); In re Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982), by ensuring the]no creditor receives more than an equitable share of the bankrupt's estate. See In re Stringer, 847 F.2d 549, 551 (9th Cir. 1988).

This equitable treatment requires that all creditors, both public and private, be subject to the automatic stay. See 2 Collier on Bankruptcy ¶ 362.04 (15th ed. 1988). Recognizing this, congress used broad language which prohibits "all entities", 11 U.S.- §

362(a), including all "governmental unit[s]", 11 U.S.C. § 101(14), from moving against a debtor's property during the pendency of the bankruptcy proceedings. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 342, reprinted in 1978 U.S. Code Cong. & Admin. News 6299; In re Eisenberg, 7 Bankr. 683, 687 (E.D.N.Y. 1980).

It is true, as the county argues, that the prohibitions of § 362(a), when applied to the taxing arm of local government, may hinder that government -- as it does other creditors -- from collecting funds needed for its continuing operations, and, at least in part, from receiving full compensation for services that may benefit the debtor or the debtor's property. But it is also true that this is a necessary step if bankruptcy courts are to effectively an fairly reorganize and liquidate a bankrupt's estate. Indeed, if a bankruptcy court lacked such power, actions by local

government "would pull out chunks of an estate from the reorganization court and * * * [would] seriously impair the power of the court to administer the estate". Gardner v. New Jersey, 329 U.S. 565, 577 (1947); see In re Morton, 866 F.2d 561, 564 (2d Cir. 1989) (state law must be suspended if it conflicts with the goals of the automatic stay).

In short, the county's first argument, that the tax liens here were created without "action" and thus did not violate the automatic stay, interprets the provisions of § 362(a) too narrowly and misconstrues congress's intent when it included local governments among the entities subject to the automatic stay. We therefore decline to adopt it.

2. Exceptions to § 362(a).

As an alternative position the county claims to qualify under the exception to the automatic stay that is authorized by §§ 362(b)(3) and 546(b) of the code.

Section 362(b)(3), which creates one of several statutory exceptions to the automatic stay, provides that the filing of a petition does not operate as a stay of "any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to perfection under section 546(b)". Section 546(b), in turn, exempts from the trustee's power of avoidance "any generally applicable law that permits the perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection." (emphasis added).

Thus, simply stated, if a creditor possesses a prepetition interest in property, and state law establishes a time period for perfection of a lien based upon that interest, the "lien does not lose its preferred standing by reason of the fact that it [is] not perfected until after the commencement of bankruptcy" so long as it is perfected within the time period established by state law. Poly Industries, Inc. v. Mozley, 362 F.2d 453, 457 (9th Cir.), cert. denied, 385 U.S. 958 (1966). The relatively narrow purpose of this exception is to "protect, in spite of the surprise intervention of [the] bankruptcy petition, those whom State law protects" by allowing them to perfect an interest they obtained before the bankruptcy proceedings began. H.R. Rep. No. 595, 95th Cong., 1st Sess. 371, reprinted in 1978 U.S. Code Cong. & Admin. News 6327; S. Rep. No. 989, 95th Cong., 2d Sess. 86,

reprinted in 1978 U.S. Code Cong. & Admin. News 5872.

Here, there is no dispute either that state law allows for perfection of the tax lien on December 1 of the tax year, or that the county did perfect its liens on December 1 of each year. Thus, the only real question as to whether the exception under § 546(b) applies is whether the county had an "interest in [the] property" before December 1, and if so, when that interest arose.

The secured creditors would have us hold, as did the distribute and bankruptcy courts, that the county has no interest in the property until the lien date, December 1, when each year taxes became due and payable. In contrast, the county would have us hold, as has our sister court of appeals for the fourth circuit, that the county's "interest in

property", at least as far as taxation is concerned, is "long-standing" and "ever-present", Maryland National Bank v. Mayor & City Council of Baltimore, 723 F.2d 1138, 1142-43 (4th Cir. 1983), so that a new, super-priority tax lien arose each December 1 of the six tax years at issue here. We have carefully considered both of these positions, and we conclude that for the tax system in Suffolk County, neither rationale is correct.

On one hand, we are satisfied that, under New York tax law, the county did have an interest in the racetrack property before the taxes thereon actually became due and payable and the lien attached. Taxation of real property in Suffolk County does not begin with the attachment of the lien each December 1; to the contrary, the process begins seven months earlier with the tax status date, see N.Y. Real Prop. Tax Law § 302; Suffolk County Tax Act §

5, "as of" which all real property is "valued according to its condition". Northville Industries v. Board of Assessors, 143 A.D.2d 135, 136, 531 N.Y.S.2d 592, 593 (2d Dep't 1988). Except for miscalculations or other clerical mistakes, and any adjustments made during the brief review period, these assessed values serve as the basis for all taxes in the "upcoming year, regardless of any change in the status or value of some articular property at a later date. Adirondack Mountain Reserve v. Board of Assessors, 99 A.D.2d 600, 601, 471 N.Y.S.2d 703, 705 (3d Dep't), aff'd in part and appeal dismissed in part, 64 N.Y.2d 727, 475 N.E.2d 115, 485 N.Y.S.2d 744 (1984). In other words, eventhough the property taxes will not be levied or paid until at least six months later, and even though the value and use of the land could change dramatically before that time, the assessment of the property which will be used to determine the tax due, is made by

looking only to the value of the property on the tax status date, see In re Addis Co., 79 A.D.2d 856, 857, 434 N.Y.S.2d 489, 490 (4th Dep't 1980), without any regard to possible changes in condition or ownership before the lien attaches. See, e.g., R.P. Adams Co. v. Nist, Misc. 2d 374, 411 N.Y.S.2d 504 (N.Y. Sup. Ct. 1978), rev'd on other grounds, 72 A.D.2d 908, 422 N.Y.S.2d 184 (4th Dep't 1979); Roosevelt Nassau Operating Corp. v. Board of Assessors, 68 Misc. 2d 183, 326 N.Y.S.2d 628 (N.Y. Sup. Ct. 1970), aff,d, 41 A.D.2d 647, 340 N.Y.S.2d 871 (2d Dep't 1973).

Of course, after the tax status date other acts are required before the amount of the tax is determined and the lien securing that tax attaches to any particular piece of property. But these acts are merely further steps towards the completion of the taxation process and the perfection of the county's interest in the

property -- an interest which arose on the tax status date when the county determined that the property was taxable, and when it fixed the value of the property for that tax year. See Northville, 531 N.Y.S.2d at 595; Adirondack, 471 N.Y.S.2d at 705; see also Maryland National Bank, 723 F.2d at 1143 (attachment of the lien "is only the last -- not the first -- step required to perfect" an interest in real property).

On the other hand, we are also unpersuaded by the fourth circuit's view that the county has an interest in the property that is "ever-present" because of its inherent governmental authority and control over the land. Maryland National Bank, 723 F.2d at 1142. Statutory exceptions to the automatic stay are to be interpreted narrowly and in accordance with its underlying rationale. In re Stringer, 847 F.2d 549, 552 (9th Cir.

1988). That rationale -- that all creditors of a bankrupt estate, including local governments receive fair and equal treatment -- would be effectively destroyed if, for every year of the bankruptcy proceeding, the county were granted priority over all secured creditors and allowed to collection on its tax liens as they attach. See In re Guterl Special Steel Corp., 95 Bankr. 370 (W.D. Pa. 1989).

Moreover, even interpreting the exception liberally, we question whether 546(b) was ever intended to apply repeatedly during a prolonged bankruptcy. Section 546(b) was enacted to aid the creditor who, "surprise[d] [by the] intervention of [the bankruptcy petition", is prohibited by the automatic stay from perfecting its interest in the debtor's property, but who otherwise would still be permitted to perfect that interest under state law. H.R. Rep. No. 595, 95th Cong., 1st Sess.

371, reprinted in 1978 U.S Code Cong. & Admin. News 6327. The section was "not designed to give the States an opportunity to enact disguised priorities in the form of liens that apply only in bankruptcy cases." Id.

Yet that is exactly what the county would have us do here. Instead of interpreting §546(b) as a one-time exception for the creditor who gave value but has not yet perfected its lien, the county would have us create a rotating exception, which, every December 1, would add another lien at the front of the priority line, enabling the county to effectively collect on all its claims as if no bankruptcy petition had ever been filed. Such an interpretation would effectively remove the taxing arms of local government from the controlling provisions of the bankruptcy code, a result clearly contrary to the intent of congress. See 11 U.S.C. § 101(14); H.R. Rep.

No. 595, 95th Cong., 1st Sess. 342, reprinted in 1978 U.S. Code Cong. & Admin. News 6299; see also Gardner v. New Jersey, 329 U.S 565 (1947).

With these considerations in mind, and after examining the provisions of the tax act, we hold that the county obtains an "interest in [the] property" sufficient to fall under § 546(b) on June 1, the tax status date. All assessment of property occurs as of that date, and from that time forward, the county has a real and identifiable interest in the property which cannot be erased or altered by subsequent events. See, e.g., Rochester Housing & Authority v. Sibley Corp., 77 Misc. 2d 205, 351 N.Y.S.2d 934 (N.Y. Sup. Ct. 1974) (if property is nonexempt on tax status date it remains nonexempt for tax year even if exempt organization acquires the property before the tax lien attaches), aff'd@ 47 A.D.2d 718, 367 N.Y.S.2d 969 (4th Dep't 1975); R.P. Adams Co.,

411 N.Y.S.2d at 506 (same); Roosevelt, 326 N.Y.S.2d at 631-32 (portion of improvement to property which was not completed on tax status date could not be included in assessment for that tax year).

Moreover, practical necessity required that there be some key date for determining the assessed values, and in New York state, including Suffolk County, that date is the "tax status date". All tax districts in the county must calculate their annual tax rates based on the assessment roll. They must divide the total assessed valuation into the budget amount to be raised by taxes, and the quotient is the tax rate for the following year. Thus, the tax burden for every taxpayer would be affected by any changes in assessed valuations.

Some no doubt will contend that our holding conflicts with the fourth circuit's

determination in Maryland National Bank. While facially our analyses may differ, we think a full reading of the record in both cases shows our holdings to be reconcilable even if not congruent. First, both cases depend heavily on state tax law, which differs significantly between New York and Maryland. While the tax act in Maryland gave the fourth circuit significant indication that local government possessed a "long-standing" interest in the property, see 723 F.2d at 1142-43, the tax act at issue here makes absolutely no suggestion that the county's interest accrues any earlier than the tax status date. Second, stripped to its bare holding, Maryland National held only that a bankruptcy petition filed on October 31, 1979, only two months before the "date of finality" under local tax law (presumably the date when the assessment roll becomes final), did not render invalid a tax lien perfected some six months later on July 1,

1980, because the local taxing entity had possessed an "interest in [the] property" before the petition was filed. That is similar to our holding here: The bankruptcy petition, filed on June 12, 1979, nearly two weeks after the tax status date and more than two months before September 1 when the assessment roll becomes "final", does not render invalid a tax lien perfected months later on December 1, 1979, because the taxing entity possess an "interest in [the] property" before the petition was filed.

Applying this rule to the facts in this case, we conclude that the county holds valid tax liens for the first two tax years at issue. For the 1978-79 tax year, the county completed the entire taxation process before the bankruptcy petitions were filed, and the district and bankruptcy courts were therefore

correct when they found a valid tax lien for that year in the amount of $327,231.45.

In addition, and contrary to the holdings in the district and bankruptcy courts, the lien for the 1979-80 tax year is also valid, this time under the provisions of 546(b). The county acquired an "interest in property" on June 1, 1979, the tax status date, twelve days before the first petition in bankruptcy was filed. As provided by state law, the lien securing the taxes levied in reliance upon that interest was perfected on December 1, 1979, and continues in effect today.

However, as to all remaining liens, because the county did not possess, prior to the filing of the bankruptcy petition, a sufficient "interest in property" to qualify for the § 546(b) exception, we must conclude that creation and perfection of each [these

later liens violated the automatic stay. Hence, each of these remaining liens is void, and the county stands in the shoes of an unsecured creditor as to the amount due for each of those tax years

B. Postpetition Interest on Valid Tax Liens.

We next consider whether, under 11 U.S.C. 506(b), the county was entitled to a priority on the interest on its valid tax liens. That section states:

> To the extent that an allowed secured claim is secured by property the value of which * * * is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

In light of this language, the district court held that the county was not entitled to

any interest on its valid tax liens, because the interest provision was not "provided for under [an] agreement", as required by § 506(b), but was instead mandated by the tax act.

Recently, however, the Supreme Court, interpreting language and punctuation of § 506(b), has held that the section "entitles the holder of an oversecured claim to postpetition interest and, in addition, gives one having a secured claim created pursuant to an agreement the right to reasonable fees, costs, and charges provided for in that agreement. Recovery of postpetition interest is unqualified." United States v. Ron Pair Enterprises, Inc., 109 S. Ct. 1026, 1030 (1989).

Ron Pair directly controls in this case, insofar as the county possesses valid, oversecured liens on the racetrack. As we determined above, the county possesses two such

liens: one for the 1978-79 taxes and one for the 1979-80 taxes. Accordingly, we reverse that part of the judgment of the district court that relates to postpetition interest on these two liens, and remand to the district court for a calculation of interest.

C. Penalties on the Valid Tax Liens.

Ron Pair also answers the question whether, under § 506(b), the county is entitled to priority on its penalty claims. Under the bankruptcy code, "[r]ecovery of fees, costs, and charges is allowed "only if they are reasonable and provided for in the agreement under which the claim arose." In the absence of such an agreement, fees and costs are not recoverable. Ron Pair, 109 S. Ct. at 1030.

Here, the claims for penalties arose, not under an agreement between the parties, but by

operation of law under the tax act. Consequently, the district court was correct when it held that § 506(b) did not apply to penalties, and that the secured creditors had priority over the county's penalty claims.

We note that because the priority provisions of § 506(b) are inapplicable, and because the district court found that the penalties did not represent any pecuniary loss to the county -- a finding which is not clearly erroneous on the record before us -- U.S.C. §726(a)(4) determines in what order the county's penalty claims should d be satisfied in relation to other creditors. Thus, if an money remains after the secured creditors' and other, higher priority claims are satisfied, the county can recover its penalty claims from the estate.

CONCLUSION

The county possesses valid tax liens, entitling them to priority over the secured creditors, for the 1978-79 and 1979-80 tax years. The county is also entitled to a priority for postpetition interest, determined under the tax act, on these two claims, but not for any penalties.

As to the claims based on tax years after 1979-80, the county's tax liens are invalid. Therefore, as to these amounts, priority goes to the secured creditors.

Affirmed in part, reversed in part, and remanded.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In Re:

PARR MEADOWS RACING ASSOCIATION, INC.,

Petitioner in Bankruptcy.

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In re:

RONALD J. PARR,

Petitioner in Bankruptcy.

----------X

MEMORANDUM AND ORDER
CV 87-2657

(Wexler, J)

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WEXLER, District Judge

This is an appeal from an order of the bankruptcy court (J. Hall), which granted Suffolk County priority over secured creditors with respect to pre-petition real property

taxes and denied the County priority with respect to its claim for post-petition real property taxes, interest, and penalties.

I. BACKGROUND

On October 17, 1977, the debtor, Parr Meadows Racing Association ("Parr Meadows") filed for relief in bankruptcy court, seeking to reorganize pursuant to Chapter 11 of the Bankruptcy Code ("Code"). On June 12, 1979, the petition was dismissed, and Ronald J. Parr, Chairman of Parr Meadows, filed for Chapter 11 relief and was authorized to conduct his affairs as debtor-in-possession. Two days after this filing, Parr caused to be conveyed to himself Parr Meadows' only asset, a racetrack located in Suffolk County, New York.

By order dated August 15, 1978, the bankruptcy court lifted the automatic stay to permit Flushing Savings Bank, Parr Meadows'

principal secured creditor at that time, to seek a declaratory judgment that the property was fraudulently conveyed. On April 27, 1980, the Appellate Division for the Second Department, reversing the lower court, held that Parr transferred the property with intent to hinder and delay creditors.

In the meantime, on October 4, 1979, Parr Meadows filed a second bankruptcy petition pursuant to Chapter 11. On April 7, 1980, the reorganization petition was converted to a Chapter 7 liquidation case and Parr was adjudicated a bankrupt. On May 10, 1985, the bankruptcy court authorized the sale of the racetrack for $750,000 in cash and a note and mortgage on the racetrack property in the amount of $10,750,000. Since the proceeds of the sale would not satisfy all of the claims against the estate, the bankruptcy court had to determine which creditors were to receive priority.

Suffolk County instituted an adversary proceeding claiming priority for more than $4,300,000 in pre-petition and post-petition real property taxes, which had accrued on the property, and for interest and penalties. Lincoln Savings Bank, which, by virtue of an assignment from Flushing Savings Bank, holds a first mortgage lien of $14 million on the race track, joined by the other secured creditors, objected to the County's claim of priority with respect to unpaid post-petition real property taxes, interest, and penal..penalties.

In response to the County's objections to the trustee's s plan to sell the racetrack, the bankruptcy court ordered the trustee to pay $500,000 to Suffolk County as partial payment of the County's claim against the estate. In June 1987, the court approved the trustee's sale of the racetrack note and mortgage for $7,500,000 in cash. The closing took place on August 13, 1987.

In an order dated July 7, 1987, the bankruptcy court held that Suffolk County was entitled to priority only with respect to pre-petition real property taxes amounting to $327,231.45. Since the County had already received a $500,000 pre-payment of its claim, the court ordered the County to repay to the trustees $172,768.58, and directed that the County not be permitted to share in the remaining proceeds of the sale of the racetrack. On August 11, 1987,.the County applied to the bankruptcy court for a stay of its order. The request was denied. This appeal followed.

On August 19, 1987, this Court stayed the order of the bankruptcy court requiring a $172,768.58 repayment by Suffolk County and ordered that the trustees hold $4 million of the proceeds from the sale of the note and mortgage on the racetrack. The remaining $3.5

million has been distributed to the secured creditors.

II. DISCUSSION

Suffolk County contends that it is entitled to priority over secured creditors on its claims for: (1) post-petition real property taxes on the racetrack for the tax years 1979-80 through 1984-85; (2) a 5% penalty for late payment of each year's taxes; and (3) interest of 1% per month on the taxes and penalties.

A. POST-PETITION REAL PROPERTY TAXES

With respect to Suffolk County's claim of priority for real property taxes which accrued after the filing of the petition over claims of the secured creditors, the bankruptcy court held that the County's tax claim is a

post-petition claim for which lien status cannot be attained due to the automatic stay provision of the Code. 11 U.S.C. § 362. The automatic stay rule provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of...any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4). Governmental units are within the code's definition of the term "entity" and, thus, are subject to the bar against creating, perfecting, or enforcing liens against a bankrupt's property. 11 U.S.C. § 101(14).

(1). Suffolk County advances several arguments in support of its position that the automatic stay rule does not relegate the County's post-petition tax claims to a lesser status than the claims asserted by the secured creditors. The County first argues that it did not engage in any act to create, perfect or enforce its tax lien, but rather, the tax lien

was created and perfected automatically on a fixed day pursuant to the Suffolk County Tax Act. The Suffolk County Tax Act provides that "[a]ll taxes upon real property shall become a lien and be due and payable on December first of each year...." Suffolk County Tax Act, art. 1 § 13(b). Therefore, the County contends that, in the absence of any affirmative action on its part, the tax liens perfect despite the imposition of the automatic stay. The Court finds this argument unpersuasive.

The automatic stay rule is one of the most fundamental precepts of bankruptcy jurisprudence. It provides a bright line at which all efforts to assert or secure an interest against the debtor must cease. The County urges this Court to adopt an overly narrow interpretation of the scope of the automatic stay provision that would allow the County to legislate a rule of "passive creation and perfection" in order to circumvent a central

protection afforded the debtor and existing creditors.

In addition to being more in keeping with the nature and purpose of the automatic stay rule, a broad construction of this rule is consistent with the relevant case law. In In re Carlisle Court, Inc., 36 B.R. 209 (Bankr. D. D.C. 1983), a secured creditor with a pre-petition lien sought a judgment declaring his priority over the District of Columbia's post-petition real property tax claim. The bankruptcy court.. held that the automatic stay prevented creation of the tax lien, and therefore, the District of Columbia could not assert priority over the pre-petition lienholder. See also In re Stack Steel & Supply Co., 28 B.R. 151, 155 (Bankr. W.D. Wash. 1983)("any [tax] lien which is claimed by [the] County to have attached after the filing of the Chapter 11 petition is void")(emphasis in the original). Accordingly, this Court rejects the

County's argument that, in the absence of any action on its part, the automatic stay rule does not preclude perfection of its post-petition tax lien on the debtor's property. (2). The County next argues that, even if the automatic stay rule is otherwise applicable to its tax lien, an exception to the rule allows the County to perfect its interest after intervention of the bankruptcy petition. The County's argument is as follows: An exception to the automatic stay provides that "[t]he filing of a petition...does not operate as a stay...(3)...of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title." 11 U.S.C. § 363(b)(3). Thus, if § 546(b) is applicable, the automatic stay may be defeated. Section 546(b) provides that "[t]he rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to

any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection." 11 U.S.C. § 546(b). Section 545 is the portion of the Code which vests in the trustee the power to avoid perfection of a statutory lien. Thus, § 546(b) limits the trustee's power to avoid perfection of a statutory lien where the lienholder's interest in the property existed prior to the filing of the bankruptcy petition and "a generally applicable law" allows perfection of that interest to relate back prior to the filing of the petition.

Suffolk County contends that its interest in collecting real estate taxes on the racetrack has always existed and that the Suffolk County Tax Act is a generally applicable law which allows for retroactive perfection of that interest. Therefore, the

County maintains that, pursuant to § 546(b), the trustee cannot prevent perfection of the lien.

The Fourth Circuit employed this reasoning in Maryland Nat'l Bank v. Mayor of Baltimore, 723 F.2d 1138 (4th Cir. 1983), giving the City of Baltimore's post-petition real property tax claim priority over claims of secured creditors. The Fourth Circuit held:

> Congress in enacting § 546(b) perceived that the mere intervention of a petition in bankruptcy should not be permitted to defeat what would otherwise be a valid security interest in property. If that interest awaits perfection, and if the generally applicable state law permits that perfection to be good against an intervening purchaser, then the trustee should stand in no better shoes than such an intervening purchaser.
>
> We conclude, then, that the district court was in error when it held that the trustee in bankruptcy could avoid the imposition of the City s real property tax lien for the year 1980-81. Imposition of that tax

> lien, under Article 81 § 70, was only the last - not the first - step required to perfect the State's long standing interest in the real property in question, and a step which, under Maryland law, no entity could prevent. The City was entitled to that perfection under § 546(b) of the Bankruptcy Code when July 1, 1980 came around, and, thus entitled to the super priority which the then-arising lien afforded.

Id. at 1143-44.

The applicability of § 546(b) to the present case is contingent upon this Court's acceptance of two underlying assumptions. First, the Court must find that the County s interest in collecting post-petition real property taxes on the race track property antedates the filing of the bankruptcy petition and, therefore, the invocation of the automatic stay. Second, the Court must view the Suffolk County Tax Act as a "generally applicable law" that permits perfection of an interest in property to be effective retroactively.

With respect to whether the County's interest in collecting the taxes at issue pre-dates the bankruptcy petition, the County maintains that its interest has always existed and, thus, transcends the bankruptcy. Although there is some appeal to the notion that a sovereign has a supreme interest in collecting taxes which dates back to the time when the sovereign first assumed dominion and control over the land, the idea that this amorphous interest is of the type contemplated by § 546(b) is forced and misguided. Any present legal interest the County may have in real property taxes can only be created at such time as those taxes accrue and become due and payable. See In re Ballentine Bros., Inc., 86 B.R. 198, 201 (Bankr. D. Neb. 1988). Until that time, the County's interest in collecting those taxes is merely hypothetical and anticipatory in nature.

Contrary to the Fourth Circuit's logic in Maryland Nat'l Bank, at the time a government entity's interest in collecting future property taxes first arises (theoretically, the date of the entity's inception) the government's interest is not a ripened one merely awaiting.. a ministerial act of perfection. Rather, the government at that point possesses only an expectation of collecting future taxes, an expectation that reaches fruition only when the tax to be paid accrues, is assessed, and becomes due and payable.

This Court also rejects the County's second premise, i.e., that the Suffolk County Tax Act is a generally applicable law that permits retroactive perfection of a pre-established interest in property. As noted above, the Suffolk County Tax Act provides that "[a]ll taxes upon real property shall become a lien and be due and payable on December first of each year..." Suffolk County Tax Act, art. I

§ 13(b). Noticeably absent from this provision is any language providing that such tax lien will be deemed perfected as of a date earlier than the date the taxes become due and payable. The most reasonable interpretation of the Suffolk County Tax Act is that it creates a tax lien as of the date the property taxes are due, and that that lien is also automatically perfected as of the date the taxes become due. Syllogistically, then, it follows that since this perfected interest post-dates the filing of the bankruptcy petition, it is avoidable by the trustee.

The overly expansive interpretation of § 546(b) for which the County argues does not comport with the limited purpose for which this exception to the trustee s avoidance powers was enacted. The legislative history of this section makes clear that:

> The purpose of the subsection is to protect, in spite of the

> surprise intervention of a bankruptcy petition, those whom State law protects by allowing them to perfect their liens or interests as of an effective date that is earlier than the date of perfection. It is not designed to give the States an opportunity to enact disguised priorities in the form of liens that apply only in bankruptcy cases.

S. Rep. No. 95-989, 95 Cong., 2d Sess. 86, reprinted in 1978 U.S. Code Cong. & Admin. News 5872. To hold that the Suffolk County Tax Act is a generally applicable law permitting the County to perfect an ever-existing, anticipatory interest in collecting future taxes, effective as of the date the County first obtained dominion and control over the race track property, would distort § 546(b)'s purpose of preventing a pre-existing, unperfected creditor from being harmed by the surprise intervention of bankruptcy, and would allow Suffolk County to legislate a tax priority in direct contravention to Congress' express prohibition.

The legislative history of § 546(b) cites to § 9-301(2) of the Uniform Commercial Code as an illustration of what Congress viewed as a generally applicable law that permits retroactive perfection. U.C.C. § 9-301(2), which many states have adopted, affords one with a purchase-money security interest ten days in which to perfect that interest. This ten day grace period allows the interest holder to maintain his status as an earlier creditor over one that obtains and perfects an interest during the intermediate days between the time the purchase-money security interest arose and the date of its perfection. So too does the interest holder maintain his status as a prior secured creditors during the ten day grace period in the context of an intervening bankruptcy.

This Court cannot adopt the position that the Suffolk County Tax Act provides an indefinite grace period during which Suffolk

County can perfect its tax lien. Such an interpretation cannot be inferred from the language of the Act itself and is wholly inconsistent with the limited nature of § 546(b)'s exception to the trustee's avoidance power.

It is worthy of note that Congress did provide an exception to the automatic stay for governmental actions or proceedings seeking to enforce a police or regulatory power. 11 U.S.C. § 362(b)(4). This exception has been strictly construed as permitting only actions for injunctive, nonpecuniary relief, and courts applying this exception have closely scrutinized the governmental unit's motive for bringing the action to ensure it is one of public safety and welfare, and not one that protects a monetary interest in the bankruptcy property. See In re Ballentine, 86 B.R. at 202; In re Charter First Mortgage, Inc., 42 B.R. 380, 381 (Bankr. D. Or. 1984); In re Herr,

28 8.R. 465 (Bankr. D. Me. 1983); In re Dan Hixson Chevrolet Co., 12 B.R. 917, 920 (Bankr. N.D. Tex. 1981); see also 124 Cong. Rec. H 11, 092 (daily ed. Sept. 28, 1978)(Statement of Rep. Edwards), reprinted in 1978 U.S. Cong. Code. & Admin. News 5787, 6436, 6444-45 (stating that it is not the purpose of this section to allow "a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate). It stands to reason that if Congress intended to except from the automatic stay a governmental entity's ability to collect post-petition property taxes it would have expressly provided for it just as it excepted from the stay a governmental entity's ability to enforce its regulatory or police power. This Court will not legislate an exception that Congress declined to enact. Accordingly, this Court declines to adopt the County's argument that it had a pre-existing interest in collecting unaccrued taxes which

was retroactively perfected, for to do so would be to force the proverbial square peg into the infamous round hole.

The County's position that its post-petition taxes are entitled to priority over the claims of secured creditors therefore lacks legal support. The Court, nonetheless, is somewhat troubled by the resulting loss of tax revenue that the County will suffer, tax revenues that it would otherwise derive from the racetrack property if it were occupied by one not operating under the protection of the bankruptcy code. The very existence of government is contingent upon the successful collection of taxes. The County's receipt of taxes enables it to achieve its objectives and perform the functions of government. Those paying taxes do so in order to enjoy the protection of their property interests and the many benefits of organized society. As the reknowned philosopher John Locke long ago

recognized, "The great and chief end...of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of nature there are many things wanting." J. Locke, Second Treatise of Government, pg. 86 (1963). This Court, however, must adjudicate within the confines of the Bankruptcy Code and the broad, sweeping power of the automatic stay. The Code draws only a few narrow exceptions to the automatic stay rule. The County asks this Court to either limit the automatic stay rule to allow government entities to circumvent the stay or to stretch the parameters of § 546(b) in such a manner that would be tantamount to legislating an exception to the stay for post-petition property taxes. This the Court cannot do.

(3). The County next contends that post-petition taxes should not be considered an ordinary: administrative expense under § 503,

but should instead be awarded the status of a special expense for the preservation of the estate pursuant to § 506(c). Section 506(c) provides that, "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c). Under the County's theory, the property taxes would be deducted directly from the value of the race track, a particular asset of the estate, and not be charged as an administrative expense of the estate in general. The Court does not accept this position.

In order to quality for a § 506(c) "super-priority", the expense must be one that the trustee incurred with the consent or for the direct benefit of the creditor whose claim the property secures. In re Flagstaff Foodservice Corp., 762 F.2d 10 (2d Cir. 1985);

Brookfield Prod. Credit Ass'n v. Barron, 738 F.2d 951, 952 (8th Cir. 1984). Section 506(c) was not intended to encompass ordinary administrative expenses that are attributable to the general operation and dissolution of an estate in bankruptcy. Rather, it was designed to extract from a particular asset the cost of preserving or disposing of that asset. The trustee's payment of real property taxes might benefit Lincoln Savings Bank and the other secured creditors to the extent that monies raised from the collection of property taxes are used, in part, to fund the local fire, police, and road maintenance departments, which provide protection to the secured property against vandalism and fire, and. ensure that the adjoining road is kept in good condition. This indirect benefit, however, is insufficient to bring these post-petition property taxes within the scope of § 506(c).

Courts have narrowly construed § 506(c) to encompass only those expenses that are specifically incurred for the express purpose of ensuring that the property is preserved and disposed of in a manner that provides the secured creditor with a maximum return on the debt and also apportions those costs to the secured creditors who, realistically, is assuming the asset. See In re Cascade Hydraulics and Utility Serv., 815 F.2d 546, 548 (9th Cir. 1987); In re Trim-X, Inc., 695 F.2d 296, 301 (7th Cir. 1982). Although in exchange for the payment of property taxes, the estate would reap benefits that might aid in preserving the asset in the advent of fire or from the threat of vandalism, this incidental benefit is not what was contemplated by § 506(c). Monies a government entity derives from the collection of real property taxes fund many governmental operations and services which are not directly related to preservation and

disposal of the asset and in no way provide a benefit to the secured creditor. Real estate tax revenues support public parks, libraries, schools, and social services, which do not constitute expenses peculiarly connected with preserving or disposing of the parcel of land.

Moreover, the Bankruptcy Code explicitly sets forth the level of priority to be afforded unsecured tax claims. Section 503, which enumerates general administrative expenses, provides that "...there shall be allowed, administrative expenses...including...(B) any tax - (i) incurred by the estate, except a tax of a kind specified in section 507(a)(7)...." 11 U.S.C. § 503(b)(1)(B)(i). Section 507(a) states, "The following expenses and claims have priority in the following order...(7) Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for...(b) a property tax assessed before the commencement of the case and last payable

without penalty after one year before the date of the filing of the petition.-." 11 U.S.C. § 507(a)(7)(B). Thus, § 503(b)(1) indicates that tax claims are generally afforded the status of ordinary administrative expenses, thereby receiving first priority after secured claims, unless they are the of type of taxes specified in § 507(a)(7), in which case they will receive a seventh ranked priority after secured claims.

Although § 503(b)(1) and § 507(a)(7) do not address post-petition tax claims, § 502(i) equates unsecured post-petition tax claims with unsecured pre-petition tax claims and indicates that they should be granted the same priority. Section 502(i) provides that "[a] claim that does not arise until after the commencement of the case for a tax priority under section 507(a)(7)...shall be determined, and shall be allowed...or disallowed, the same as if such claim had arisen before the date of the filing of the petition." 11 U.S.C. § 502(i).

There appears to be uncertainty as to whether unsecured post-petition taxes should be accorded § 503(b)(1)(B) priority or the lesser § 507(a)(7) priority. See In re Carlisle Court, Inc., 36 B.R. 209. This Court does not have to reach this issue as the County would not receive priority over Lincoln's claim under either § 503(b)(1) or § 507(a)(7) since both priorities are subordinate to the claims of secured creditors. It is apparent, however, that the County's tax claims should be placed in one of those two categories and not be given the super-priority under § 506(c) for which the County argues. See Ballentine, 86 B.R. at 203; In Re Bellman Farms, Inc., 86 B.R. 1016, 1021 (Bankr. D. S.D. 1988). To hold that post-petition tax claims are special expenses of preserving or disposing of particular property would fly in the face of the cumulative effect of §§ 502(i), 503(b)(1), and 507(a)(7).

In sum, this Court is unpersuaded by the arguments the County has presented. The automatic stay prevents the County from acquiring and perfecting, passively or otherwise, a post-petition lien. The County's lien, thus, may be avoided by the trustee. Accordingly, the County's unsecured tax lien is relegated to the status of an ordinary administrative expense, which entitles the County to either a first or seventh priority after the claims of secured creditors under § 503(b)(1)(B)(i) or § 507(a)(7)(B), respectively.

B. POST-PETITION INTEREST

Upon holding that the County's claim for post-petition property taxes is not a secured claim, it is unnecessary for this Court to reach the question of whether the County is entitled to interest on the unpaid post-petition taxes. This Court finds it

worthy to note, however, that even if this Court had found that the County had a secured interest in the post-petition property taxes, it would not have awarded the County interest on that amount. Resolution of this issue of first impression in this Circuit turns on a subtle distinction in statutory construction. Code § 506(b) provides that:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506(b). The County contends that the proper interpretation of § 506(b) requires that, to the extent that the value of the property of the estate in bankruptcy is greater than the County's "secured" tax claim, interest should be paid on that secured claim. The

County bases this reading of the statute on the placement of the comma after the phrase "interest on such claim". According to the County's interpretation, the comma sets apart the language "interest on such claim" as a separate and distinct clause to which the qualifying clause "provided for under the agreement" does not apply. Therefore, the County contends that the prerequisite of providing for such payment in an agreement applies only to fees, costs, and charges, and not to interest payments.

To support this interpretation of § 506(b), the County cites In re Best Repair Co., 789 F.2d 1080 (4th Cir. 1986), where the Fourth Circuit held that based upon the placement of the comma, interest on a claim secured by property can be had against such property even in the absence of any agreement providing for interest. The Fourth Circuit reasoned that such interpretation is supported by "the plain

meaning of the language and grammar of the provision." Id. at 182.

This Court rejects the reasoning of In re Best Repair Co., in favor of the contrary holding in In re Ron Pair Enterprises, 828 F.2d 367 (6th Cir. 1987), cert. granted, ___ U.S. ___, 108 S. Ct. 1218 (1988). In In re Ron Pair Enterprises the Sixth Circuit, interpreting § 506(b), considered pre-code common-law doctrine as well as the language of the statute. This method of statutory interpretation is preferable to that employed by the Fourth Circuit. In Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 106 S. Ct. 755, reh'g denied, 475 U.S. 1090, 106 S. Ct. 1482 (1986), the Supreme Court held that "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule

with particular care in construing the scope of bankruptcy codifications." Id. at 759-60.

Pre-Code cases have held that interest on non-consensual secured claims (claims where there is no agreement between the parties) may not accrue after the bankruptcy petition is filed. See In re Kerber Parking Co., 276 F.2d 245, 247-48 (7th Cir. 1960); United States v. Mighell, 273 F.2d 682, 684 (10th Cir. 1959); United States v. Bass, 271 F.2d 129, 131 (9th Cir. 1959). After noting that the legislative history of § 506(b) showed no intent to change the pre-Code doctrine, the court in In re Ron Pair Enterprises held that § 506(b) merely codified and did not change pre-Code doctrine. Certainly, the placement of a somewhat ambiguous comma cannot be said to constitute an expression of specific congressional intent. Since it is more sound to base the interpretation of § 506(b) on the lack of intent to overrule pre-Code cases than on the

placement of a comma, this Court finds convincing the reasoning of the Sixth Circuit in Ron Pair Enterprises.

In the case at bar, the property taxes accrued without any agreement and, thus, the County's claim is non-consensual. Therefore, since the County has a non-consensual claim against the estate, § 506(b) would not afford the County interest on that claim.

C. PENALTIES

Similarly, although it is unnecessary for the Court to reach the question of whether Suffolk County is entitled to recover penalties for nonpayment of post-petition real property taxes, this Court notes that awarding the County such penalties would be inappropriate. Debts owed to the government as a penalty or forfeiture cannot be recovered against a bankrupt estate unless the amount owed reflects

an actual pecuniary loss. Simonson v. Granquist, 369 U.S. 38, 82 S. Ct. 537 (1962). The United States Supreme Court has noted, with respect to enforcement of tax penalties against the estate of bankrupts, that allowance of such penalties "would serve not to punish the delinquent taxpayers, but rather their entirely innocent creditors." Id. at 41. The County cannot establish that these penalties represent an actual pecuniary loss. Assessment of penalties, therefore, would needlessly deprive Lincoln Savings Bank and the other secured creditors of monies that they would otherwise recover to compensate for their actual pecuniary losses suffered as a result of the bankruptcy.

III. CONCLUSION

Accordingly, for the reasons stated throughout this opinion, the decision of the

Bankruptcy Court is affirmed. The Clerk of the Court is directed to return the record to the Bankruptcy Court.

SO ORDERED.

LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York
October 14, 1988

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
AT WESTBURY

----------x

In re

PARR MEADOWS RACING ASSOCIATION, INC., — CASE NO. 879-02996-00

Debtor.

----------x

In re

RONALD J. PARR, — BANKR. NO. 79-B-1643

Bankrupt.

----------x

JAMES BARR, as Trustee of PARR MEADOWS RACING ASSOCIATION,INC., and HARVEY L. GOLDSTEIN, as Trustee of RONALD J. PARR,

Plaintiff, — ADV.NO. 882-0848-20

-against-

RONALD J. PARR, ET AL., — DECISION

Defendants.

----------x

BEFORE: HONORABLE ROBERT JOHN HALL
BANKRUPTCY JUDGE

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This matter came to be heard on the objection of Lincoln Savings Bank (Lincoln) to the claim of Suffolk County. The matter arose out of an adversary proceeding commenced by the trustee to determine the nature and extent of liens on the debtors' property. Lincoln holds a pre-petition note secured by a pre-petition mortgage on the debtor's property. The County seeks priority over Lincoln and other pre-petition secured creditors for unpaid post-petition real estate taxes. The issue in this case is therefore narrow: whether Suffolk County's post-petition tax claim has priority over Lincoln Savings Bank's pre-petition security interest.

Generally, claims secured by pre-petition liens have priority over unsecured claims and post-petition claims, because the trustee in bankruptcy has no right to avoid pre -existing liens on the debtor's property. 11 U.S.C. Section 544. The Bankruptcy Code sets forth the order of priority for unsecured and post-petition claims and creditors generally cannot file liens post-petition to attain a higher priority. 11 U.S.C. Section 362; 11 U.S.C. Section 507. Based on the general rules, Suffolk County's post-petition tax claim is therefore subordinate to the bank's pre-existing lien.

There is however an exception to the general rules. 11 U.S.C. Section 546(b) provides as follows:

> The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally

> applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection. If such law requires seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such actions has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.

Section 546(b) allows certain liens to be perfected post-petition with priority over general unsecured and post-petition creditors, provided the liens could have been perfected pre-petition under state law. The exception is meant to protect the excepted creditor against other interests acquired prior to perfection. H.R. Rep. No. 595, 95th Cong., 1st Sess. 371 (1977); Weintraub & Resnick, Bankruptcy Law Manual, paragraph 7.01 (1986).

Section 546(b) was interpreted by the Fourth Circuit to allow the perfection of liens arising from post-petition tax claims as well

as the perfection of liens arising from pre-petition claims. The court held:

> The intervention of a petition . . . should not cut off an interest holder's opportunity to perfect where the interest holder could have perfected against an entity subsequently acquiring rights in the property if bankruptcy had not intervened. Maryland National Bank v. Mayor & City Council of Baltimore, 723 F.2d 1138.

This court disagrees with the Fourth Circuit's holding that post-petition liens can be filed for post-petition claims under 11 U.S.C. 546(b). The holding in Maryland Bank contradicts the language of the statute, the legislative history, and the general rules governing priority of claims. Unfortunately, this court is unaware of any cases that have considered this issue since the Maryland Bank case.

Instead of following Maryland Bank, the court adopts the reasoning of In re Carlisle Court Inc. 36 B.R. 209 (Bankr. D.D.C. 1983) and

In re Stack Steel & Supply Co., 23 B.R. 15 (Bankr. W.D. Wash. 1983). In both of those cases the courts denied taxing authorities secured claims for post-petition taxes ahead of pre-petition secured creditors.

In conclusion, the court holds that Suffolk County has a superior claim only for taxes assessed pre-petition. The county's interest in post-petition taxes in unsecured and subordinate to Lincoln Savings Bank.

SETTLE ORDER.

Dated: Westbury, New York
June 15, 1987

ROBERT JOHN HALL
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re PARR MEADOWS RACING ASSOCIATION, INC., Debtor.	Case No. 87902996-20
In re RONALD J. PARR, Bankrupt.	Bank-ruptcy No. 79B1643
JAMES BARR, as Trustee of PARR MEADOWS RACING ASSOCIATION, INC. and HARVEY L. GOLDSTEIN, as Trustee of RONALD J. PARR, Plaintiffs, - against - RONALD J. PARR, et al., Defendants.	Adver-sary No. 882084820

Order Granting Objection of Lincoln Savings Bank, FSB to the Claim of Suffolk County Taxing Authority

At Westbury, New York, in said District on the 7th day of July, 1987.

James Barr, as trustee of Parr Meadows Racing Association, Inc., and Harvey L.

Goldstein, as trustee of Ronald J. Parr (collectively the "Trustee"), having served a summons and complaint dated December 6, 1982 (collectively the "Complaint") commencing an adversary proceeding against certain creditors with pre-petition liens on the property known as the Parr Meadows Racetrack (the "Racetrack") seeking a determination of the nature, extent and seniority of those liens, which have since attached to a note and mortgage on the Racetrack (the "Racetrack Note and Mortgage"); and it appearing that a notice was served on October 3, 1985 (the "Notice") on all secured creditors who appeared in connection with the adversary proceeding (the "secured creditors") and on the Suffolk County Taxing Authority (the "County") for a hearing to be held by this Court with respect to the Trustee's adversary proceeding; and it further appearing that, by stipulation So Ordered by this Court in December of 1986 (the "Stipulation") the secured creditors reached agreement with

respect to the priority and extent of their respective liens, and that one of the secured creditors, Lincoln Savings Bank, FSB ("Lincoln"), joined by the remaining secured creditors, has objected to the claim of the County on the grounds (i) that the County is not entitled to priority treatment for any post-petition taxes, (ii) that the County is not entitled to interest accruing on unpaid taxes subsequent to the filling of the petition, (iii) that the County is not entitled to priority treatment for any interest beyond the thirty-six months provided for in the Suffolk County Tax Act and (iv) that the County is not entitled to priority treatment for any penalties; and it further appearing that a $500,000 payment was previously made to the County on account of its claim pursuant to an order of the Court dated May 10, 1985 and that, pursuant to the terms of a Stipulation of Undisputed Facts agreed to in February 1987 among Lincoln, the other secured creditors and

the County, the said amount was applied to the 1983-1984 flat tax, interest and penalties, with the understanding that it would be reapplied in the event the Court determined that the County was not entitled to priority with respect to the 1983-1984 tax year.

Now, upon the Complaint; the Notice; the Stipulation of Undisputed Facts; the Memorandum of Law in Support of the Objection of Lincoln served on March 20, 1987; the Memorandum of Law of the County in Opposition to Lincoln's Objection served on April 10, 1987; the Reply Memorandum of Lincoln in Support of its Objection served on May 1, 1987; the letter from Patrick J. Barton to the Court dated May 15, 1987; and the letter from Harold P. Weinberger to the Court dated May 11, 1987; and the matter having been submitted to the Court and due deliberation having been had and the Court having rendered a written opinion dated June 15, 1987, it is

On motion of Kramer, Levin, Nessen, Kamin & Frankel, attorneys for Lincoln,

Ordered, that the objection of Lincoln with respect to the claim of the County is granted on the ground that the Court is not entitled to priority over pre-petition secured creditors for any post-petition taxes or claims; and it is further

Ordered, that the County has a secured claim, senior to that of the secured creditors, only with respect to pre-petition taxes in the amount of $327,231.45 and that any and all additional claims asserted by the County are unsecured and subordinate to the claims of Lincoln and the claims of the other creditors holding pre-petition secured claims; and it is further

Ordered, that, in view of the prior payment to the County of an amount which is $172,768.55 more than the County's priority claim, no further payment shall be made to the County from the proceeds of the Racetrack Note and Mortgage, and that the County shall repay said $172,768.55 to the Trustee for distribution by the Trustee pursuant to further order of this Court and in accordance with the Stipulation among the secured creditors.

_____

United States Bankruptcy Judge

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforced such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in

section 741(5) or 761(15) of this title, or setlement pay6ment as defined in Section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo

participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13) under subsection (a) of this section after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e) and (f) of this section--

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of--

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by

terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final

hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an

opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in, appropriate circumstances, may recover punitive damages.

§ 506. Determination of secured status

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

§ 545. Statutory liens

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien--

(1) first becomes effective against the debtor--

(A) when a case under this title concerning the debtor is commenced;

(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;

(C) when a custodian is appointed or authorized to take or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard; or

(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists;

(3) is for rent; or

(4) is a lien of distress for rent.

§ 546. Limitations on avoiding powers

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--

(1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302 or 1202 of this title; or

(2) the time the case is closed or dismissed.

(b) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection. If such law requires seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within

the time fixed by such law for such seizure or commencement.

(c) Except as provided in subsection (d) of this section, the rights and powers of a trustee under section 544(a), 545, 547, and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but--

(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after receipt of such goods by the debtor, and

(2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court--

(A) grants the claim of such a seller priority as a claim of a

kind specified in section 503(b) of this title; or

(B) secures such claim by a lien.

(d) In the case of a seller who is a producer of grain sold to a grain storage facility, owned or operated by the debtor, in the ordinary course of such seller's business (as such terms are defined in section 557 of this title) or in the case of a United States fisherman who has caught fish sold to a fish processing facility owned or operated by the debtor in the ordinary course of such fisherman's business, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common law right of such producer or fisherman to reclaim such grain or fish if the debtor has received such grain or fish while insolvent, but--

(1) such producer or fisherman may not reclaim any grain or fish unless such producer or fisherman demands, in writing, reclamation

of such grain or fish before ten days after receipt thereof by the debtor; and

(2) The court may deny reclamation to such a producer or fisherman with a right of reclamation that has made such a demand only if the court secures such claim by a lien.

(e) Notwithstanding sections 544, 545, 547, 548(a)(2) and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1) of this title.

(f) Notwithstanding sections 544, 545, 547, 548(a)(2) and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment,

as defined in section 741(8) of this title, made by or to a repo participant, in connection with a repurchase agreement and that is made before the commencement of the case, except under section 548(a)(1) of this title.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re PARR MEADOWS RACING ASSOCIATION, INC. Petitioner in Bankruptcy,	88-5045 NOTICE OF MOTION FOR RECALL OF MANDATE AND STAY OF ISSUANCE OF MANDATE
In Re RONALD J. PARR, Petitioner in Bankruptcy.	

. . .

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

/s/Ellsworth Van Graafieland

/s/Richard J. Cardamone

/s/George C. Pratt
CIRCUIT JUDGE

Dated: November 1, 1989

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of September, one thousand nine hundred and eighty-nine.

Present: HON. ELLSWORTH VAN GRAAFIELAND
HON. RICHARD J. CARDEMONE
HON. GEORGE C. PRATT

Circuit Judges,

IN RE: PARR MEADOWS RACING ASSOCIATION, INC.,

Debtor.

IN RE: RONALD J. PARR,

Bankrupt.

LINCOLN SAVINGS BANK, FSB, AMERICAN HOME INSURANCE COMPANY, NATIONAL UNION FREE INSURANCE CO. OF PITTSBURGH, PA., NEW HAMPSHIRE INSURANCE COMPANY and T. FREDERICK JACKSON, INC.,

Plaintiff-Appellees.

V.

SUFFOLK COUNTY TREASURER,

Defendant-Appellant.

DOCKET NO. 88-5045

A petition for a rehearing having been filed herein by Defendant-Appellant SUFFOLK COUNTY TREASURER.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of July on thousand nine hundred and eighty-nine.

Present: HON. ELLWORTH A. VAN GRAAFEILAND

HON. RICHARD J. CARDAMONE

HON. GEORGE C. PRATT

Circuit Judges,

----------x

IN RE: PARR MEADOWS RACING ASSOCIATION, INC.,

Debtor,

IN RE: RONALD J. PARR,

Bankrupt.

88-5045

LINCOLN SAVINGS BANK, FSB, AMERICAN HOME INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA., NEW HAMPSHIRE INSURANCE COMPANY and T. FREDERICK JACKSON, INC.,

Plaintiffs-Appellees,

- V. -

SUFFOLK COUNTY TREASURER,

Defendant-Appellant.

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Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for Eastern District of New York, and was arged by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjuged and decreed that the Judgment of said District Court be and it hereby is affirmed in part, reversed in part and remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Elaine B. Goldsmith,
Clerk

By: EDWARD J. GUARDARO,
Deputy Clerk

ISSUED AS MANDATE:October 3, 1989

No. 89-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SUFFOLK COUNTY TREASURER,

Petitioner,

—v.—

LINCOLN SAVINGS BANK, FSB, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT LINCOLN SAVINGS BANK, FSB IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court invoke its certiorari jurisdiction to reconcile a purported conflict between the decision below of the Second Circuit Court of Appeals and a decision of the Fourth Circuit Court of Appeals as to whether, despite the automatic stay provision of the Bankruptcy Code, a taxing authority may obtain priority lien status for post-petition, unaccrued, future tax claims on the basis of an alleged ever-present property interest in collecting real estate taxes where:

(a) the court below held only that there is no such interest manifested by state or local law in this case, and thus premised its decision on adequate and independent state law grounds;

(b) the holding below is not in conflict with the cited Fourth Circuit decision, which is based on an interpretation of different local law; and

(c) to the extent the decision below contains *dicta* critical of the Fourth Circuit decision, it is consistent with clear Congressional intent and has been recently endorsed by the only other Court of Appeals to reach the issue?

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RULE 28.1 STATEMENT

Lincorp, Inc. is the parent company of respondent Lincoln Savings Bank, FSB. Lincorp, Inc. is, in turn, a wholly-owned subsidiary of Unicorp American Corporation, a public company, the majority of which is owned by Unicorp Canada Corporation, also a public company.

Several other pre-petition secured creditors, specifically, American Home Insurance Co., National Union Fire Insurance Co. of Pittsburgh, Pa., New Hampshire Insurance Co. and T. Frederick Jackson, Inc., were parties to the proceedings below and join with Lincoln in this brief. The Rule 28.1 statement as to these parties is as follows:

American International Group Inc. is the parent of all three insurance company respondents, who have no affiliates other than wholly-owned subsidiaries of American International Group Inc.

Olsen Industries, Inc. is the parent company of respondent T. Frederick Jackson, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-900

SUFFOLK COUNTY TREASURER,

Petitioner,

—v.—

LINCOLN SAVINGS BANK, FSB, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT LINCOLN SAVINGS BANK, FSB IN OPPOSITION

Respondent Lincoln Savings Bank, FSB ("Lincoln"), joined by respondents American Home Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa. and New Hampshire Insurance Company (collectively, the "AIG Insurance Companies") and T. Frederick Jackson, Inc. ("Jackson"), respectfully submits that the petition does not present any issue meriting review by this Court.

In this bankruptcy matter, petitioner asks this Court to review the judgment and order of the Court of Appeals for the Second Circuit denying secured and priority status for several years of post-petition real estate tax claims which, when the bankruptcy petition was filed, were not due and payable and as to which the taxing process had not even begun. The court held that these post-petition claims were not secured, relying on the automatic stay provision of the Bankruptcy Code, which bars

"any act to create, perfect or enforce any lien" once a bankruptcy petition is filed. The court rejected petitioner's argument that it had an "ever-present interest" in collection of future real estate taxes, allowing post-petition creation and perfection of liens with priority over pre-petition mortgages on the real property in question under an exception to the automatic stay provision.

The petition fails to mention that, for petitioner to prevail on the merits, this Court would have to reverse the Court of Appeals on a question of New York state and local law. The Court of Appeals held that under the relevant New York State and Suffolk County tax laws, petitioner had no such "ever-present interest" and that the exception relied on by petitioner thus did not even arguably apply to this case. Unnecessary to the court's decision was its *dicta* that, in any event, any such interest would not, as a matter of federal law, justify the post-petition creation and perfection of liens as to future tax years. It is this *dicta* that petitioner would have this Court review, but to even reach the question this Court, contrary to its stated practice, would have to review and reverse the court below on an issue of local law.

For the same reason, the claimed conflict between the decision below and that of the Fourth Circuit in *Maryland Nat'l Bank v. Mayor and City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983) is wholly illusory. In *Maryland Nat'l Bank*, the court relied heavily on Maryland law in concluding that the taxing authority did have an "ever-present interest" in collecting future real estate taxes. Hardly emblematic of a conflict, the holdings of the two cases represent differences between Maryland and New York law. Moreover, *Maryland Nat'l Bank* had no occasion to address the situation presented here, where claims are asserted as to several future tax years with respect to which the taxing process had not commenced at the time of the bankruptcy petition's filing. Indeed, the Fourth Circuit's rationale indicates that it might well have viewed such a situation as did the court below.

Lastly, the *dicta* in the decision below is entirely correct. Congress simply did not intend to allow taxing authorities to legislate their way around the automatic stay by claiming the right to perfect, post-petition, "ever-present interests" in property for the duration of a bankruptcy proceeding. The exception to the automatic stay relied on by petitioner was intended solely to protect a creditor who, unlike the petitioner in this case, gave value prior to the filing of a petition but, surprised by the intervention of bankruptcy, was unable to perfect a lien which he would otherwise have been able to perfect under applicable state law. The only other court of appeals to address this issue, the Third Circuit in a decision rendered after that of the court below, has ringingly endorsed the federal law views of the Second Circuit.

STATEMENT OF THE CASE

1. The Facts

This case was presented to the courts below on the basis of stipulated facts, which are recounted in the opinions of the Court of Appeals (App. at 7a-14a) and the District Court (App. at pp. 43a-47a).[1] We briefly summarize them here.

This litigation arises out of the bankruptcies of two debtors: Parr Meadows Racing Association ("Parr Meadows"), and Ronald J. Parr ("Parr"), at all relevant times the chairman of the board of Parr Meadows. On October 17, 1977, Parr Meadows filed an original petition seeking an arrangement pursuant to Chapter 11 of the Bankruptcy Act. The principal asset of Parr Meadows was the Parr Meadows Racetrack (the "Racetrack"), located in Yaphank, New York in Suffolk County. Prior to the filing, the Racetrack was encumbered by a mortgage in the principal amount of $14 million, now held by Lincoln, which was given by Parr Meadows and perfected against the Racetrack property on August 26, 1976; by a mortgage held by the AIG Insurance Companies in the principal amount of

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1 Citations to "App." are to the appendix filed with the petition.

$4 million, also given by Parr Meadows and perfected on August 26, 1986; and by a chattel mortgage held by Jackson dated February 8, 1977 relating to certain lighting, pari-mutuel and other electrical equipment at the Racetrack. (App. at 7a-9a, 43a-45a).

Parr Meadows voluntarily dismissed the petition on June 12, 1979, the same day that Parr filed a petition for relief pursuant to Chapter 11 of the Bankruptcy Act. Two days later, Parr, in his capacity as chairman of Parr Meadows, caused the Racetrack to be conveyed from Parr Meadows to himself. On April 27, 1980 the Appellate Division of New York Supreme Court held that this conveyance had been made with actual intent to hinder and delay creditors of Parr Meadows and thereby determined that the Racetrack belonged in the estate of Parr Meadows. In the interim, on October 4, 1979, Parr Meadows filed a second petition, this time pursuant to Chapter 11 of the newly effective Bankruptcy Code (the "Code"). (App. at 7a-8a, 43a-44a).

On May 10, 1985, James Barr and Harvey L. Goldstein, who had been appointed as trustees of Parr Meadows and Parr, respectively, put aside the dispute as to ownership and together sold the Racetrack to an entity called Suffolk Meadows Corporation, receiving approximately $750,000 and a note and mortgage on the Racetrack in the amount of $10,750,000. The property was sold free and clear of liens, which attached to the funds and the note and mortgage held by the trustees. In response to petitioner's opposition to the transaction, the Bankruptcy Court ordered the trustees, as an interim measure, to pay $500,000 to petitioner in partial reduction of petitioner's claim for real property taxes, more fully described below. Thereafter in June 1987, the Bankruptcy Court approved the sale of the note and mortgage held by the trustees for the discounted sum of $7.5 million dollars in cash, all liens again attaching to the proceeds. As the only remaining asset of the estates, this $7.5 million was all that was available to pay the claims of the secured creditors, which aggregated in excess of $18 million in principal amount alone. (App. at 9a-12a, 44a-45a).

2. The Bankruptcy Court Proceedings

In connection with the sale of the Racetrack note and mortgage in 1987, proceedings were initiated to determine the priority and extent of the liens that would attach to the proceeds. Petitioner, citing in relevant part an exception to the automatic stay in Sections 362(b)(3) and 546(b) of the Code, asserted secured status and priority over pre-petition secured creditors for all unpaid real estate taxes, plus interest and penalties on those taxes, whether the taxes had become payable before or after the filing of the petition.

Specificially, petitioner claimed secured, priority status for unpaid real estate taxes assessed against the Racetrack property for the tax years 1978-79, 1979-80, 1980-81, 1981-82, 1982-83 and 1984-85, interest on those taxes at the rate of 1% per month and statutory penalties.[2] The total amount of the unpaid tax included in the petitioner's claim was $2,245,978.80. All but $327,231.45 of this amount—the tax owing for the 1978-79 tax year, which was not contested—was for sums that did not become due and payable until after the filing of the operative Parr Meadows petition in October, 1979 or the Parr petition in June, 1979. Indeed, with the exception of the tax for 1979-80, the tax valuation process had not even begun for any of the tax years at issue at the time the petitions were filed. Petitioner also claimed interest and penalties on all unpaid taxes which, at the time of submission to the Bankruptcy Court, aggregated more than $1.6 million. (App. at 10a-11a, 45a-46a).[3]

Joined by the other secured creditors, Lincoln objected to petitioner's claim and contended that petitioner should have

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2 Petitioner's claim did not include the 1983-84 tax or interest on that tax because petitioner had applied the $500,000 it received in 1985 to eliminate those charges.

3 Under the authority of this Court's decision in *United States v. Ron Pair Enterprises*, 109 S. Ct. 1026 (1989), the court below held that petitioner would be entitled to add to its claim post-petition interest with respect to any real property taxes as to which petitioner was determined to have valid liens. Under the same authority, the court below rejected petitioner's claim for penalties. Neither of these holdings is at issue on this petition.

priority only with respect to taxes due and payable prior to the filing of the petition. The Bankruptcy Court agreed, holding that petitioner was entitled to secured treatment with respect to $327,231.45 of its claim, consisting of real property taxes for the 1978-79 tax year that had been assessed and perfected as liens before the most current bankruptcy petitions were filed in 1979. (App. 78a-83a). The Bankruptcy Court reasoned that "Section 546(b) allows certain liens to be perfected post-petition with priority over general unsecured and post-petition creditors, *provided the liens could have been perfected pre-petition under state law.*" (App. at 81a (emphasis in original)). But the court refused to accord secured status with respect to the remaining tax years, rejecting petitioner's argument that "post-petition liens can be filed for post-petition claims under 11 U.S.C. 546(b)." (App. at 82a). It therefore ordered petitioner to repay to the trustees, for ultimate distribution to respondents, the difference between the $500,000 petitioner had previously received and that portion of petitioner's claim representing the 1978-79 taxes. (App. 84a-89a).[4]

3. The District Court's Decision

The District Court affirmed, explicitly rejecting petitioner's position that its interest in collecting real estate taxes "has always existed" even as to future tax assessments and, therefore, allows for retroactive perfection of that interest under Section 546(b). (App. at 42a-77a). In *dicta*, the court observed that "[t]he overly expansive interpretation of § 546(b) for which the County argues does not comport with the limited purpose for which this exception to the trustee's avoidance powers was enacted." (App. at 57a). This discussion was not necessary to the court's holding, however, because the court also rejected petitioner's position "that the Suffolk County Tax Act . . . permits retroactive perfection of a pre-established interest in property." (App. at 56a). The court ruled that under the Act,

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4 That order, and the distribution to respondents of these funds and the balance of the $7.5 million proceeds, has been stayed pending appeals at each level and is currently stayed pending disposition of this certiorari petition.

real property taxes become due and payable on December 1 of each year and become liens that are automatically and simultaneously perfected. Prior to this time, the court held, the government possesses merely an "expectation," not a "ripened" interest "awaiting . . . a ministerial act of perfection." (App. at 56a).

4. The Court of Appeals' Decision

Though it reversed in part and affirmed in part, the Second Circuit similarly found state and local law to be controlling. (App. at 1a-41a). To be sure, the Court of Appeals "question[ed] whether 546(b) was ever intended to apply repeatedly during a prolonged bankruptcy." (App. at 30a). The court criticized petitioner's argument for "a rotating exception, which, every December 1, would add another lien at the front of the priority line, enabling the county to effectively collect on all its claims as if no bankruptcy petition had ever been filed . . . , a result clearly contrary to the intent of [C]ongress." (App. at 31a). Again, however, this discussion was *dicta*; the court held that there was no state law basis for petitioner's argument and, thus, there was no foundation for measuring it against federal bankruptcy law.

The court carefully scrutinized the applicable provisions of the New York Real Property Tax Law and the Suffolk County Tax Act, finding that the real property taxation process in Suffolk County commences each year on June 1, the tax status date "as of" which the property is valued. This is followed by several other steps in the valuation process, culminating on December 1 of each year when taxes become due and payable and a lien on the real property. (App. at 4a-7a). Unlike the two courts below it, the Court of Appeals deemed the earlier tax status date to be the date at which petitioner acquired an "interest in property" for purposes of Section 546(b)'s exception to the automatic stay, even though on that date the taxes are not due and payable nor is a lien created. Since the tax status date for the 1979-80 tax year occurred on June 1, 1979, before either bankruptcy petition was filed, the court held that under Section 546(b) petitioner was able to perfect its lien on December 1,

1979 as to those taxes, and that petitioner was entitled to secured status for taxes and interest for the 1979-80 tax year in addition to 1978-79. (App. at 26a-29a).

The court below, however, rejected on state and local law grounds petitioner's position that it had "an interest in the property that is 'ever-present' " and that automatically antedated the filing of the bankruptcy petitions as to all future tax years. (App. at 29a). The court stated that "the tax act at issue here makes absolutely no suggestion that the county's interest occurs any earlier than the tax status date." (App. at 34a). The court carefully noted that for this reason, its holding did not conflict with that of the Fourth Circuit in *Maryland Nat'l Bank*, *supra*, which held that Maryland law did admit of such an "ever-present interest." For these reasons, the court affirmed the decisions below denying petitioner secured status for any of the years after 1979-80. (App. at 32a-35a).

REASONS FOR DENYING THE WRIT

1. The Court of Appeals' Decision Rests on an Adequate and Independent State Law Ground and Therefore Should Not Be Reviewed by This Court

To grant petitioner the relief it seeks would require this Court to overturn the Court of Appeals' holding on an issue of New York and Suffolk County law, affirming the holdings of the two other courts below which also sit in New York. For this reason alone, this Court should deny the petition.

The governing standard was stated by this Court in *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944): "[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." In 1980, when this Court promulgated Rule 17.1 to guide review on certiorari, the Court omitted a prior provision (in predecessor Rule 19(1)(b)), that considered relevant a court of appeals' decision resolving "an important state or territorial question in a way in conflict with applicable state or territorial law." *See* R. Stern, E. Gressman,

S, Shapiro, *Supreme Court Practice* 212 (6th ed. 1986). Yet review of a state law issue is precisely what petitioner would have this Court do.

The automatic stay provision of the Bankruptcy Code stays "any act to create, perfect or enforce any lien against property of the estate" once the petition has been filed. 11 U.S.C. § 362(a)(4). Section 362(b)(3) excepts from the automatic stay "any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under Section 546(b)." 11 U.S.C. § 362(b)(3). Section 546(b), in turn, exempts from the trustee's power of avoidance "any generally applicable law that permits the perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection." 11 U.S.C. § 546(b).

It is undisputed that, in this case involving real property taxation, whether or not there is an "interest in property" allowing post-petition perfection of a lien is determined by reference to state and local law.[5] And the Court of Appeals determined that with respect to real property taxes in Suffolk County, New York, neither state nor local law gives petitioner any "interest in property" until June 1 of each tax year, the tax status date. The court held unequivocally that "the tax act at issue here makes absolutely no suggestion that the county's interest accrues any earlier than the tax status date." (App. at 34a). In reaching this holding, the court scrutinized the New York Real Property Tax Law and the Suffolk County Tax Act[6] and relied on no less than six state law decisions.[7]

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5 *See e.g., Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80, 84 (3d Cir. 1989) ("The determination whether a property tax has become a lien is determined according to state law."). Petitioner has not argued, neither in the petition nor in any of the courts below, that this is an issue of federal law.

6 *See esp.* App. at 26a-27a (citing N.Y. Real Prop. Tax Law § 302; Suffolk County Tax Act § 5).

(*Footnote 7 is on next page*)

The Court of Appeals also criticized petitioner's position as being inconsistent with Congress' purpose in enacting Section 546(b). (App. at 30a-32a). However, as the court recognized in "question[ing]" petitioner's position rather than rejecting it outright, the commentary was *dicta*. Only if local law provided for some sort of ongoing or "ever-present" property interest in the collection of future real estate taxes would it have been strictly necessary for the court below to decide whether such a law would be within the Section 546(b) exception to the automatic stay.

Thus, the only way for this Court to grant petitioner the relief it seeks is to determine that petitioner did have under local law an "ever-present interest" in future real estate tax collection—contrary to the holdings of three courts below, all sitting in New York. Because this is not an issue that needs to be addressed by this Court, certiorari should be denied.

2. The Court of Appeals' Decision Does Not Conflict With That of Any Other Court of Appeals

Petitioner urges that this Court grant certiorari because of an alleged conflict between the opinion of the Second Circuit, below, and the decision of the Fourth Circuit in *Maryland Nat'l*

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7 *Northville Indus. v. Board of Assessors*, 143 A.D.2d 135, 136, 531 N.Y.S.2d 592, 593 (2d Dep't 1988); *Adirondack Mountain Reserve v. Board of Assessors*, 99 A.D.2d 600, 601, 471 N.Y.S.2d 703, 705 (3d Dep't), *aff'd in part and appeal dismissed in part*, 64 N.Y.2d 727, 485 N.Y.S.2d 744 (1984); *In re Addis Co.*, 79 A.D.2d 856, 857, 434 N.Y.S.2d 489, 490 (4th Dep't 1980); *Rochester Hous. Auth. v. Sibley Corp.*, 77 Misc. 2d 205, 351 N.Y.S.2d 934 (Sup. Ct. 1974), *aff'd*, 47 A.D.2d 718, 367 N.Y.S.2d 969 (4th Dep't 1975); *R.P. Adams Co. v. Nist*, 97 Misc. 2d 374, 411 N.Y.S.2d 504 (Sup. Ct. 1978), *rev'd on other grounds*, 72 A.D.2d 908, 422 N.Y.S.2d 184 (4th Dep't 1979); *Roosevelt Nassau Operating Corp. v. Board of Assessors*, 68 Misc. 2d 183, 326 N.Y.S.2d 628 (Sup. Ct. 1970), *aff'd*, 41 A.D.2d 647, 340 N.Y.S.2d 871 (2d Dep't 1973).

Bank v. Mayor and City Council of Baltimore, 723 F.2d 1138 (4th Cir. 1983).[8] But petitioner is wrong, for two reasons.

In the first place, because the decision below and the Fourth Circuit decision both turn on state law, there is no conflict between them. *Maryland Nat'l Bank* accepts an "ever-present interest" argument based upon an interpretation of Maryland state and local law; the opinion of the court below holds that New York's taxing statutes create no such interest. This so-called conflict is hardly cause for this Court's intervention. *See Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) ("As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari.").

Second, it is not at all clear that the holding of the *Maryland Nat'l Bank* case—as distinguished from its broad pronouncement of the taxing authority's "ever-present interest"—supports petitioner's claim, since the only issue actually raised in the case was the status of one year's taxes, which were not due and payable at the time the petition was filed but as to which the taxing process may well have begun. The justification for invoking this Court's certiorari jurisdiction is thus absent, since "there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." R. Stern, E. Gressman, S. Shapiro, *supra*, at 196.

In *Maryland Nat'l Bank*, the debtor filed a voluntary petition for reorganization under Chapter 11 on October 31, 1979. The City of Baltimore thereafter asserted its right to be paid real property taxes and related fees for the years 1979-80 and 1980-81 from the proceeds of the sale of the property, and the trustee initiated an adversary proceeding to determine the city's rights. There was no dispute as to the 1979-80 taxes, since a lien for those taxes had been perfected against the property on July 1, 1979, well before the filing of the petition. But the parties dis-

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8 The petition also contends that the decision below conflicts with that of the Fifth Circuit in *Stanford v. Butler*, 826 F.2d 353 (5th Cir. 1987). As we show below, *Stanford* is irrelevant to this case.

puted the 1980-81 taxes, the lien for which would not have been perfected under Maryland law until July 1, 1980, after the bankruptcy petition had been filed. The court applied the Section 546(b) exception to the automatic stay and held that the city did have an enforceable security interest against the property for its 1980-81 taxes.

The court relied heavily on Maryland law in rendering this decision. In particular, the court found that Article 81, § 202(b) of the Maryland Code required that on sale of a property by a trustee, the proceeds were to be applied to taxes due and payable at the time of distribution even if at the time of sale the taxes had not yet become due and payable. The court also relied on Article 81, § 70 of the Maryland Code in reasoning that the "purchaser of real property cannot avoid the consequences of a property tax lien on the purchased realty where the lien represents taxes accrued before the date of sale." 723 F.2d at 1142. Construing these provisions together, the court held:

> "The State has retained the right to require first application of the proceeds from the sale of the property, to taxes due and payable by the time of distribution, a right that is immediately perfected, if not enforceable until the sale actually occurs, at the very moment an interest in the real estate—such as the Bank's mortgage, or a *bona fide* purchaser's fee simple holding—arises. *The interest, by force of the generally applicable law of Maryland, is ever-present*, and has been a recognized attribute of the State's property interest since a time well before 1978 when the deeds of trust effecting the security interest of the Bank came into being."

Id. (emphasis added).

The court below quite properly noted the fundamental similarities between its decision and *Maryland Nat'l Bank*. In each case, the court refused to focus woodenly on the date that the lien in question was perfected which "is only the last—not the first—step required to perfect" an interest in real property. *Id.* at 1143 (cited favorably by court below, App. at 29a). Each case looked to state law to determine the existence of an "interest in

property." The only legal distinction of consequence between the decisions is: "While the tax act in Maryland gave the fourth circuit significant indication that local government possessed a 'long-standing' interest in the property, . . . the tax act at issue here makes absolutely no suggestion that the county's interest accrues any earlier than the tax status date." (App. at 34a). *See also Matter of Isley*, 104 B.R. 673 (Bankr. D.N.J. 1989) (distinguishing *Maryland Nat'l Bank* on New Jersey law grounds and persuaded by decision below because of similarity between New York and New Jersey law).

Moreover, as noted by the Court of Appeals, even though in federal law *dicta* the court below criticized petitioner's "ever-present interest" argument, it is not at all clear that the Fourth Circuit would have decided the case below any differently than the Second Circuit. In both cases, the bankruptcy petition was filed just before the "date of finality" for that year's taxes. The court below found that the earlier "tax status date" for that year's taxes (which occurred before the filing of the petition) manifested the taxing authority's interest in the Racetrack property. It is impossible to tell from the *Maryland Nat'l Bank* decision whether a similar prior event in the tax valuation process for the one year at issue animated the court's reasoning that Maryland's interest in the property was "long standing." (See *App.* at 34a-35a).

The Fourth Circuit certainly did not have a situation before it that is comparable to this case. That court was asked to allow post-petition perfection of a claim for a single year's taxes, not for a "rotating exception" to "apply repeatedly during a prolonged bankruptcy." (App. at 30a-31a). Indeed, at least one rationale employed by the Fourth Circuit indicates that it might itself have agreed with the Second Circuit if faced with the same scenario.

The Fourth Circuit analogized the pre-petition secured creditor to a "hypothetical purchaser" of real estate (purchasing as of the date of the filing of the bankruptcy petition) who must know that taxes accruing at the date of purchase but not yet due and payable would be the purchaser's responsibility and who

"would factor that consideration into the equation in determining what he would be willing to pay." *Maryland Nat'l Bank*, 723 F.2d at 1142-43, n.10. It is doubtful in the extreme that the same hypothetical purchaser would calculate not one but six future accruing years of tax liability, during which time it would have no use of the property. For these reasons, the Fourth Circuit decision is not only inapposite because of its reliance on state law, but is distinguishable on its own terms. *See Wisconsin Elect. Co. v. Dunmore Co.*, 282 U.S. 813 (1931) ("It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certioriari is dismissed as improvidently granted.").

Lastly, this Court need not concern itself with petitioner's make-weight argument that the decision below is in conflict with the Fifth Circuit decision in *Stanford v. Butler*, 826 F.2d 353 (5th Cir. 1987). The Fifth Circuit did not, in a way that has the slightest bearing on this case, follow *Maryland Nat'l Bank*. No post-petition taxes were at issue in *Stanford v. Butler*. *See* 826 F.2d at 354, n.1. The language quoted in the petition, taken entirely out of context by petitioner, responds to an argument that only recorded, as opposed to unrecorded, statutory liens are entitled to secured status. The court held simply that perfected pre-petition statutory liens are secured for purposes of the Bankruptcy Code even if they are unrecorded. The opinion cites *Maryland Nat'l Bank* solely for the unremarkable propositions that the "Bankruptcy Code continue[s] to treat statutory liens created by state law for taxes as secured claims," *id.* at 355, and that "Section § 546(b) permits perfection after bankruptcy filing," *id.* at 357. It hardly adopts the alleged "approach of the Fourth Circuit" with respect to the issues in the present case, as petitioner asserts. (Petition at 13).

Thus, what remains of the purported "intolerable conflict" urged by the petitioner (Petition at 2) is a dispute between, on the one hand, *dicta* in the decision below and, on the other hand, a holding of the Fourth Circuit based on distinguishable facts. Under these circumstances, there is no basis or sound reason for this Court to accept the case.

3. The Court of Appeals' Rejection of the "Ever-Present Interest" Argument Is Entirely In Keeping With The Clear Intent of Congress and Is Endorsed by the Only Other Court of Appeals to Reach the Issue

A final reason why this Court should not grant the petition is simply that the Court of Appeals' *dicta* in rejecting the petitioner's "ever-present interest" argument is overwhelmingly correct. The clear weight of the legislative history supports the decision below. Moreover, the only other court of appeals to reach the question, the Third Circuit in a recent decision, strongly endorsed the views of the court below.

Petitioner's position abrogates no less than four central, unambiguous purposes of Congress in enacting the Section 546(b) exception to the automatic stay. First, Congress intended that any exceptions to the automatic stay be interpreted narrowly. As the court below held, there simply is no provision in the applicable state statutes supporting petitioner's assertion of an "ever-present interest," let alone a provision to be construed narrowly.

Second, Section 546(b) was "not designed too [sic] give the States an opportunity to enact disguised priorities in the form of liens that apply only in bankruptcy cases." H.R. Rep. No. 595, 95th Cong. 1st Sess. 371, *reprinted in* 1978 U.S. Code Cong. & Admin. News 6327. Petitioner's "interpretation would effectively remove the taxing arms of local government from the controlling provisions of the bankruptcy code, a result clearly contrary to the intent of [C]ongress." (App. at 31a).

Third, Congress intended that all creditors, including local government, be treated fairly and equally. *See In re Guterl Special Steel Corp.*, 95 B.R. 370 (Bankr. W.D. Pa. 1989). That purpose "would be effectively destroyed if, for every year of the bankruptcy proceeding, the county were granted priority over all secured creditors and allowed to collect on its tax liens as they attach," (App. at 30a), while secured creditors could not foreclose or otherwise benefit from the use of the property.

Finally, "[t]he purpose of [Section 546(b)] is to protect, in spite of the surprise intervention of [the] bankruptcy petition, those whom State law protects by allowing them to perfect their liens or interests as of an effective date that is earlier than the date of perfection." *House Report*, *supra* at 371, reprinted in U.S. Code Cong. & Admin. News at 6327. This affords lien claimants an "opportunity to leapfrog back in time so that *the consideration they furnished* may not become a windfall for a supervening creditor." *In re Electric City, Inc.*, 43 B.R. 336, 340 (Bankr. W.D. Wash. 1984) (emphasis supplied). Or, as the court below put it, Section 546(b) was intended "as a one-time exception for the creditor *who gave value* but has not yet perfected its lien." (Emphasis supplied). Under no conceivable stretch of the imagination can it be contended that petitioner gave value, prior to the filing of the bankruptcy petition, for tax years long in the future.

It should also be noted that the "ever-present interest" analysis in *Maryland Nat'l Bank* has gained no allies among the circuit courts since the decision in 1983. To the contrary, the only court of appeals decision other than *Maryland Nat'l Bank* and the court below addressing the federal law issue urged by the petition is *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80 (3d Cir. 1989). In *Equibank*, the court rejected a municipality's claim for 1987 real property taxes which became liens in July 1986, after the April 1985 petition was filed. Although it, too, relied on local law, the court disposed of the municipality's citation of the *Maryland Nat'l Bank* case with the observation that the reasoning of the Second Circuit in this case was "far more convincing." *Id.* at 86. The petition should thus be denied for the additional reason that there appears to be little danger that the expansive reading of the Fourth Circuit's decision urged by the petitioner is likely to be adopted by other appellate courts.

CONCLUSION

The petition should be denied.

Dated: New York, New York
December 22, 1989

Respectfully submitted,

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RIEF

No. 89-900

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

In Re PARR MEADOWS RACING ASSOCIATION, INC.,
Petitioner in Bankruptcy.

SUFFOLK COUNTY TREASURER,
Petitioner,
V.

JAMES BARR, as Trustee of PARR MEADOWS RACING ASSOCIATION, INC. and HARVEY L. GOLDSTEIN, as Trustee of RONALD J. PARR, RONALD J. PARR,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Like many other communities across the nation, the City of New York ("City") relies heavily on real property tax revenue. Real estate taxes in the last year amounted to approximately 6.5 billion dollars, constituting 41.6% of the revenue derived just from City sources alone, and 24.8% of the total revenue inclusive of Federal and State contributions. Since every dollar is needed for providing essential governmental services, a decision which severely restricts collection of duly imposed taxes poses a serious threat to municipal functions.

The authority for local taxation in New York State is derived from the New York Real Property Tax Law. Pursuant to New York Real Property Tax Law §300, all real property within the State is subject to taxation unless specifically exempted therefrom by law. The New York Municipal

Home Rule Law §10, empowers localities to design individual administrative procedures and to implement time-tables for the preparation and collection of taxes. The City Charter and Administrative Code, however, in all essential respects provide the same procedures as those set forth in the Suffolk County Charter. The decision of the Court below, therefore, has serious impact on the City as well as on other similarly situated taxing units and seriously impedes their ability to collect necessary real property taxes during a bankruptcy.

The decision is vulnerable for other reasons as well. It disregards the plain language and intent of the governing statute, 11 U.S.C.§546(b), and appears to conflict with a decision of the Court of Appeals in another jurisdiction on the very same vital issue. Maryland National Bank v. Mayor and City Council of Baltimore, 723

F.2d 1138 (4th Cir. 1983). This unsettled state of the law creates further difficulties and the lack of uniformity complicates collection of taxes even more. Since the question presented by the appeal here is a frequently recurring one of considerable administrative importance to the City as well as to other similarly situated taxing authorities, the City respectfully submits this brief, pursuant to Rule 36.4 of the Rules of this Court, in support of the Suffolk County Treasurer's petition for writ of certiorari.

ARGUMENT

THE WRIT SHOULD BE GRANTED IN ORDER TO RESOLVE THE ISSUE OF WHETHER TAXING AUTHORITIES CAN QUALIFY UNDER THE EXCEPTION TO THE AUTOMATIC STAY THAT IS AUTHORIZED BY §§362(b)(3) AND 546(b) OF THE CODE AND THUS ALLOW POST PETITION REAL ESTATE TAXES TO BE TREATED AS SECURED CLAIMS.

In the instant case, review by this Court is warranted because the issue presented is a recurring one of public importance and nationwide significance. The Court below, in affirming a judgment which disallowed priority lien status for some of the real estate taxes that became due after the debtor's bankruptcy petition on June 12, 1979, held that Suffolk County had valid tax liens only for the first two tax years at issue. In re Parr Meadows Racing Association, Inc., 880 F.2d 1540 (2d Cir.

1989). The decision was predicated on 11 U.S.C. §362(a)(4), which, in pertinent part, provides:

> . . . a petition filed under . . . of this title . . . operates as a stay, applicable to all entities, of . . . (4) any act to create, perfect, or enforce any lien against property of the estate.

However, 11 U.S.C. §362(b)(3) provides that the filing of a petition does not operate as a stay:

> . . . of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) . . .

Section 11 U.S.C. §546(b) provides further:

> [t]he rights and powers of the trustee under . . . 545 [avoidance power] . . . are subject to any generally applicable law that permits perfection of an interest in property to

> be effective against an entity that acquires rights in such property before the date of such perfection.

Thus, where there is a generally applicable law that permits perfection to be valid against an intervening purchaser, as is true in the instant case, "then the trustee should stand in no better shoes than such an intervening purchaser." Maryland, 723 F.2d at 1143.

The Court below held that Suffolk County had a valid tax lien for the 1978-79 tax year because it had completed the entire taxation process before the bankruptcy petition was filed. Parr Meadows, 880 F.2d at 1548. It relied on 11 U.S.C. §546(b) in finding that the lien for the 1979-80 tax year was also valid. In this connection, the Court stated that "(t)he county acquired an 'interest in property' on June 1, 1979, . . . twelve days before the

first petition in bankruptcy was filed." Id. at 1548. But for the remaining years, the Court found that Suffolk County did not possess a sufficient "interest in property" to qualify for the 11 U.S.C. §546(b) exception and thus the creation and perfection of each of these later liens violated the automatic stay. Id. at 1548. Therefore, the Court found that these liens were void and Suffolk County was an unsecured creditor for the amount due for each of those years. Id. at 1549.

This decision deviates from the holding of the Fourth Circuit in Maryland [1] and,

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[1] The question whether the Bankruptcy Code allows priority lien status for real estate taxes that become due after the date of debtor's bankruptcy petition has sharply divided the lower courts. The third Circuit recently followed Parr Meadows, in declining "to find any state interest cognizable for purposes of §546(b) existing as of the date (Footnote Continued)

also, ignores the plain meaning of the statute. In Maryland the Court held that Congress, by enacting 11 U.S.C. §546(b), intended that "the mere intervention of petition in bankruptcy should not be permitted to defeat what would otherwise be a valid security interest in property." Id. at 1143. The City, like Suffolk County, under generally applicable law has a prepetition interest in the property. That interest establishes that no entity acquiring rights in the real property could prevent the subsequent perfection of the taxing authority's interest to secure payment of its real property taxes. The City Administrative Code §11-301 provides that:

> All taxes and all assessments and all

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of the bankruptcy filing . . ." Equibank v. Wheeling - Pittsburgh Steel Corp., 884 F.2d 80 (3d. Cir. 1989).

> surcharges and water rents, and the interest and charges thereon, which may be laid or may have heretofore been laid, upon any real estate now in the city, shall continue to be, until paid, a lien thereon, and shall be preferred in payment to all other charges.

Accordingly, the City each year on the date when the real estate tax becomes due and payable has a lien which is of paramount superiority.

The Court in Maryland recognized that the mortgagee knew that real estate taxes would have to be paid "if the need to foreclose should ever arise." Id. at 1146. But the Court below, in ruling as it did, allowed the bank to avoid real estate taxes as a consequence of the bankruptcy of the borrower. According to Maryland, this results in ". . . pure manna from heaven in the form of an unanticipated and unmerited

benefit . . . in the mortgagee's favor, and no congressional objective would be served." Id. at 1146.

Additionally, the interpretation of 11 U.S.C. §546(b) by the Court below contravenes the plain meaning of the statute. It erroneously focuses on the date that the County had a real and identifiable interest in the property rather than focusing on the effect of the lien once it becomes effective. The appropriate inquiry is whether the lien, once perfected, has paramount superiority over all other interests in the property. If this is so, then the trustee cannot avoid it.

A Bankruptcy Court recently found that 11 U.S.C. §546(b) itself does not employ the concept of "relation back" and the Court saw "no reason to read that concept into it." In In re Microfab, 105 B.R. 152 (Bkrtcy. D. Ma. 1989), the Court stated:

> (i)n view of the clarity of this language, I see no reason to construe §546(b) so narrowly as to apply only to lien statutes that employ the legal fiction of 'relation back.' (footnote omitted) To do so would be to elevate form and semantics over substance in order to defeat a statute that clearly requires just the opposite result. Id. at 158.

It has long been recognized that a lien on real estate is distinct from a lien on personal property or any other encumbrance. In Osterburg v. The Union Trust Company of New York, 93 U.S. 424 (1887), this Court stated:

> A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the res without regard to individual ownership,

> and when it is enforced by sale pursuant to the statute, prescribing the mode of assessing and collecting them, the purchaser takes a valid and unimpeachable title. Id. at 428.

Real estate is "immovable and ever present". Hence, "the state's interest in the property for the purposes of real estate taxation is a very real and not-to-be doubted interest that pre-exists a petition in bankruptcy." Maryland, 723 F.2d at 1144 n.14.

Moreover, real estate taxes, as distinct from personal property taxes, provide a direct benefit to the property on which they are levied because they provide for such municipal services as police, fire, sanitation, etc. They also indirectly benefit the property by providing revenue for the benefit of the community at large. In re Klefstad, 95 B.R. 622, 625 n.5 (Bkrtcy. W.D.Wis 1988). Consequently, real estate

taxes fall into a different category from other encumbrances. An argument may also be made that the payment of real estate taxes are necessary expenses which benefit the mortgagee by protecting its collateral.[2]

The instant petition offers this Court an excellent opportunity to resolve the issue of whether taxing authorities can qualify under the exception to the automatic stay that is authorized by 11 U.S.C. §§362(b)(3) and 546(b), thereby allowing post petition real estate taxes to be treated as secured claims. Moreover, the issue presented here affects not only taxing authorities but other

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[2] 11 U.S.C §506(c) provides:
(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

entities where, under applicable law, they may assert a lien that takes priority over an interest in such property that arose before the date of such perfection, e.g. environmental superliens for cleaning contaminated property.

The City and other taxing authorities across the nation need to know for budget planning whether real estate taxes that accrue post petition can be treated as secured claims. It is respectfully urged that in view of the frequent recurrence of this issue, a uniform nationwide rule is mandated. This Court should act toward creation of that uniformity.

CONCLUSION

THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI.

Respectfully Submitted,

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December 29, 1989.

No. 89-900

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief in submitted in reply to Respondent Lincoln Savings Bank FSB's brief in opposition to petitioner's application for certiorari.

ARGUMENT

POINT I

THE DECISION OF THE COURT BELOW IS FOUNDED EXCLUSIVELY UPON ITS INTERPRETATION OF THE BANKRUPTCY CODE, AND THEREFORE DOES NOT REST ON AN INDEPENDENT STATE GROUND.

Respondent argues that the decision below rests on an independent state ground. In making this argument, Respondent ignores the Circuit Court's analysis of federal law which is the foundation for the opinion below. The court below made reference to the provisions of New York State and Suffolk County real property law because of its interpretation of Bankruptcy Code Sections 362(a)(4), 362 (b)(3) and 546(b).

In narrowly interpreting the exception to the automatic stay which is carved out by 11 U.S.C. §§ 362(b)(3) and 546(b), the court below relied upon its finding that the "purpose of this exception is to 'protect, in spite of the

surprise intervention of [the] bankruptcy petition, those whom State law protects' by allowing them to perfect an interest they obtained before the bankruptcy proceedings began." (App. 24a) In defining the concept of an "interest" in property consistent with its interpretation of section 546(b), the Second Circuit expressly rejected the Fourth Circuit's view "that the county has an interest in the property that is 'everpresent' because of its inherent governmental authority and control over the land." (Second Circuit decision, App. 29a) Instead, it chose to examine state and local law solely for the purpose of determining when the County's interest under 11 U.S.C. § 546(b) arose.

Thus, while the lower court's interpretation of federal bankruptcy law makes reference to state real property law, there is no independent principle of state law upon which the Second Circuit's decision is founded. Indeed, since this is a proceeding in bankruptcy, and the issues in this case involve the proper administration of a bankrupt's estate, it is inherently a matter of federal law.

POINT II

THE LOWER COURT'S DECISION IS NOT CONSISTENT WITH THE INTENT OF CONGRESS AND THE GENERAL OBJECTIVE OF THE BANKRUPTCY CODE.

Respondent argues that municipal priority for post-petition real property taxes contravenes the intent of Congress in that: (1) "Section 546(b) was 'not designed too [sic] give the States an opportunity to enact disguised priorities in the form of liens that apply only in bankruptcy cases..."; and (2) "Congress intended that all creditors, including local government, be treated fairly and equally...." (Respondent's brief at page 15)

However, it is the interpretation of section 546(b) given by the court below which undermines these very objectives. The tax lien laws were not enacted to provide municipalities with disguised priorities in bankruptcy proceedings. The law pertaining to real estate tax liens applies to all non-exempt property without reference to bankruptcy proceedings. The interpretation placed upon 11 U.S.C. § 546(b) by the

court below makes its application dependent upon the particular language of local law. This fosters diversity rather than uniformity and encourages state and local legislative action to ensure that the governmental unit will be entitled to a priority for its taxes in a bankruptcy proceeding.

Finally, the decision below does not achieve Congress' objective of fair and equal treatment of creditors because municipalities are placed at a distinct disadvantage in protracted bankruptcy proceedings. The Second Circuit found that section 546(b) was a "one-time exception for the creditor who gave value but has not yet perfected its lien..." (App 31a) That interpretation assumes that a creditor will discontinue giving its services to the bankrupt after the commencement of the bankruptcy proceeding. A municipality simply cannot discontinue the provision of police or fire protection or other municipal services to the bankrupt's property. Thus, the municipality is

placed in the position of a creditor who is forced to continue to give its services to the debtor after the commencement of a bankruptcy proceeding without receiving any protection, by means of a priority, in return.

POINT III

RESPONDENT'S ENDEAVOR TO MINIMIZE THE CONFLICT BETWEEN THE CIRCUIT COURTS IS UNPERSUASIVE.

A principal argument advanced by Respondent for circumvention of the clear conflict with *Maryland National Bank v. Mayor and City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983), is that the Fourth Circuit only permitted post-petition perfection of a claim for a single year's taxes. This argument is without merit. It makes no difference whether the court permitted the post-petition perfection of one year or six years of tax liens. If section 546(b) permits the post-petition perfection of real property tax liens based upon the municipality's ever present interest, the number of post- petition tax years is irrelevant.

Moreover, the Fourth Circuit's analogy to a hypothetical purchaser of real property on the date the bankruptcy petition is filed is entirely consistent with the position of the County. If there were such a hypothetical purchaser in this case, that purchaser would certainly have known that taxes accruing on the date of purchase, but not yet due and payable, would be the purchaser's responsibility. New York State Real Property Tax Law § 300 provides that "[a]ll real property within the state shall be subject to real property taxation...unless exempt therefrom by law," without any reference whatsoever to the owner having actual physical possession. Therefore, it would be unrealistic and contrary to law if that hypothetical purchaser did not expect to pay real property taxes for each year of ownership.

Finally, contrary to Respondent's assertion, the Fifth Circuit's decision in *Stanford v. Butler*, 826 F.2d 353 (5th Cir. 1987) adopts the reasoning of the Fourth Circuit with regard

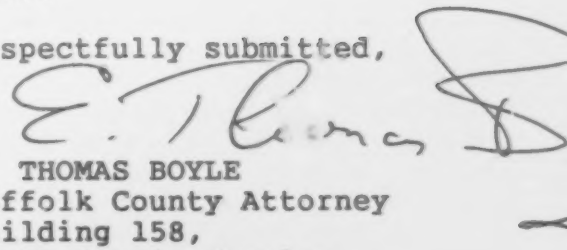
to the post-petition perfection of real property liens, and is in conflict with the Second Circuit's decision in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Hauppauge, New York
January 10, 1990

Respectfully submitted,



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